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(33,815)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No. 506

GULF REFINING COMPANY, PETITIONER,

vs.

ATLANTIC MUTUAL INSURANCE COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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1

United States District Court

SOUTHERN DISTRICT OF NEW YORK.

GULF REFINING COMPANY,
Libelant-Appellee,

against

ATLANTIC MUTUAL INSURANCE COMPANY,
Respondent-Appellant.

2

Statement.

The above entitled action was started by the filing of a libel on October 26, 1927. The original parties to this action were the libelant, Gulf Refining Company, and the respondent, Atlantic Mutual Insurance Company, and there has been no change in said original parties. The defendant was not arrested nor was bail taken nor property attached or arrested.

3

The several dates when the respective pleadings were filed are as follows:

October 26, 1917. Libel filed.

July 18, 1918. Answer filed.

March 28, 1925. An order was entered referring the case to Van Vechten Veeder, Esq., as commissioner to hear evidence and argument of counsel and to report to the Court his findings of law and of fact subject to the provisions of Admiralty Rule 27.

4

March 17, 1927. Hearing was held before the Commissioner, and testimony was taken.

March 18, 1927. Hearing was held before the Commissioner, and testimony was taken.

March 24, 1927. Hearing was held before the Commissioner, and testimony was taken.

March 31, 1927. Hearing was held before the Commissioner, and testimony was taken.

June 28, 1927. The commissioner filed his report finding that the libelant was entitled to recover of the respondent.

5 June 30, 1927. Exceptions filed by respondent to the commissioner's report, which exceptions were brought on for argument before Judge Goddard on November 18, 1927.

December 28, 1927. Judge Goddard rendered a memorandum decision overruling the exceptions and sustaining the report.

January 3, 1928. Final decree entered thereon.

January 6, 1928. Copy of final decree served on parties for respondent.

January 6, 1928. Notice of appeal by respondent filed.

6

Libel.

To the Honorable the Judges of the United States District Court for the Southern District of New York:

The Libel of the Gulf Refining Company against the Atlantic Mutual Insurance Company in an action of contract, civil and maritime, alleges, on information and belief as follows:

7

FIRST.—At the times hereinafter mentioned, the libelant, Gulf Refining Company, was, and it still is, a corporation existing under the laws of Texas.

SECOND.—At the times hereinafter mentioned, the respondent, Atlantic Mutual Insurance Company, was, and it still is, a corporation existing under the laws of New York.

THIRD.—At the times hereinafter mentioned, the Union Petroleum Company was, and it still is, a corporation existing under the laws of Pennsylvania. 8

FOURTH.—At the times hereinafter mentioned, the American steamship "Gulflight" was, and it still is, owned by the libelant, Gulf Refining Company. Until the torpedoing hereinafter mentioned, the steamship was tight, staunch, strong and in all respects seaworthy.

FIFTH.—During April, 1915, at Port Arthur, Texas, there were shipped by the Union Petroleum Company on board the "Gulflight" 5,879 tons, 2 cwt., 2 qts., 13 lbs. of gasoline in bulk, with other 9 oil cargo, to be transported to Rouen, France, and there to be delivered to Compagnie Industrielle des Petroles, or to its or their assigns.

Two bills of lading covering said cargo, and providing for the delivery thereof, as aforesaid, for a certain freight, and subject to certain agreed exceptions, were issued and delivered to and accepted by the said shipper. The bills of lading provided that general average should be payable according to the York-Antwerp Rules of 1890.

10

SIXTH.—On April 2, 1915, the respondent duly issued through Johnson & Higgins, insurance brokers, of New York, a policy of war risk insurance on the said cargo. The policy insured the sum of $27,690 on the cargo valued at $212,000 at and from Port Arthur, Texas, to Rouen, France, by the "Gulflight." It was issued for the account of whom it might concern, and loss, which was originally payable to Gulf Refining Company, was, on April 20th, 1915, by an alteration on the face of the policy, made payable to the Union Petroleum Com-
11 pany.

SEVENTH.—On April 10, 1915, the "Gulflight" left Port Arthur, bound for Rouen, France, with the said cargo on board.

The voyage proceeded without untoward incident until May 1 at about 12:50 p. m., when the steamer was torpedoed by a German submarine a short distance to the westward of Bishop's Rock, causing such damage to the steamer that it was necessary to have her towed into Crow Sound, St. Mary's, Scilly Islands, for safety. She arrived at
12 St. Mary's on May 2, apparently in a sinking condition. Through the intervention of the Salvage Association, London, which acted by agreement for all concerned, the salvage steamer "Lady of the Isles" was sent to the assistance of the "Gulflight." It was found impossible to send the steamer forward with a full cargo, owing to her deep draft forward, and no vessel into which part of the cargo could be transferred being obtainable, it was arranged by agreement of all concerned that 1,500 tons of gasoline in bulk should be sold, on the understanding that the loss thereon, including freight, should be treated as general average, which was

done. The steamer then effected temporary repairs, and proceeded for Rouen on June 9, convoyed by the "Lady of the Isles." She arrived at Havre June 11, and with the assistance of river steamers, reached Rouen on the 13th, and completed the discharge of her cargo on the 18th to the consignee, which then held the shipping documents. 13

EIGHTH.—By reason of the premises, certain extraordinary expenses and sacrifices of a general average nature were necessarily incurred by the master, agents and owner of the "Gulflight" for the common benefit and safety of the interests involved in the ship, cargo and freight, respectively, consisting of the items shown in the Statement of General Average hereinafter referred to. Such extraordinary expenses were advanced by the owner of the "Gulflight" for the various interests at risk, and for account of the respective interests therein. The owner of the said cargo became liable to pay a ratable contribution to the aforesaid expenditures incurred for the common benefit and safety of the ship, cargo and freight as above set forth, and including the expense of completing the voyage to Rouen as aforesaid. 14 15

NINTH.—Thereafter, Johnson & Higgins, as average adjusters, were employed to draw up a statement and apportionment of the general and particular average losses and expenses aforesaid. On or about February 24, 1916, the said Johnson & Higgins correctly stated and apportioned the losses and expenses aforesaid in a Statement of General Average in accordance with the York-Antwerp Rules of 1890, as provided for in the bills of lading, and with the aforesaid agreement. In and

16

by the said statement, it was found and shown that there was due from the owner of the cargo a contribution in General Average amounting to $49,088.04. Under the terms of the respondent's insurance, the respondent has become liable to pay 27,690/212,000ths of said $49,088.04, which amounts to $6,669.19.

TENTH.—After the delivery of that part of the cargo that was carried forward to Rouen, the Compagnie Industrielle des Petroles, who were insured
17 under the policy, duly assigned, transferred and set over to the Union Petroleum Company all its right, title and interest in and to any claim which it then had, or might thereafter acquire, for or on account of loss or damage to the cargo of the "Gulflight", resulting from the damage done to the vessel as aforesaid, and from the discharge and sale of a portion of the cargo and repairs to enable the vessel to continue on her voyage, and also all its right in and to the proceeds of the cargo so sold and to any allowance that may be made in general average in respect of any and all of the beforementioned
18 losses and expenses to the said cargo, together with all claims that it may have as a party, concerned in said cargo, including the respondent, for loss, damage, general average contribution and expenses, as well as all claims of every other nature or kind that it had or may hereafter acquire against such underwriters in connection with the premises; and they thereby gave to the said Union Petroleum Company, and its successors, full power and authority, for their own use and benefit, to ask, demand, collect, receive, compound and give acquittance for the same or any part thereof, and in their name or otherwise to prosecute any suits or pro-

ceedings therefor. This assignment included such rights as the consignee had, as the concerned, under the policy issued by the respondent as aforesaid.

ELEVENTH.—Thereafter the Union Petroleum Company, by a similar instrument in writing, in the same terms, *mutatis mutandis*, for a good consideration, made an assignment of all its rights in the premises to the Gulf Refining Company.

TWELFTH.—By reason of the premises, the respondent has become liable to pay to the libelant the sum of $6,669.19, together with interest. Payment of this sum has been duly demanded from the respondent by the libelant, but has been refused, and the said sum remains wholly due, unpaid and owing from the respondent to the libelant.

THIRTEENTH.—All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE, the libelant prays that process in due form of law may issue out of this court against the said respondent, citing it to appear and answer in the premises, and that a decree may be entered herein in favor of the libelant against the said respondent for the sum of $6,669.19 with interest and costs, or that the court will grant to the libelant such other and further relief as the justice of the cause may require.

KIRLIN, WOOLSEY & HICKOX,
Proctors for Libelant,
Office and Post Office Address,
27 William Street,
Borough of Manhattan,
City of New York.

22

State of New York,
County of New York, } ss.:

Mark W. Maclay, Jr., being duly sworn, says:

I am a member of the firm of Kirlin, Woolsey & Hickox, proctors for the libelant herein. The foregoing libel is true to the best of my knowledge, information and belief.

The sources of my information and the reasons for my belief as to the matters not within my own knowledge are statements, correspondence and
23 office records of the Gulf Refining Co., and their agents.

The reason this verification is not made by the libelant is because it is a foreign corporation, no one of the officers of which is now within this District to the best of my knowledge, information and belief.

MARK W. MACLAY, JR.

Sworn to before me this
26th day of October, 1917.

24

Jos. K. Innes,
Notary Public,
Kings County No. 5.
Cert. N. Y. County No. 3.

Answer.

To the Honorable the Judges of the United States District Court for the Southern District of New York:

The Atlantic Mutual Insurance Company answering the libel of the Gulf Refining Company alleges as follows:

First.—It admits the allegations of the First, Second, Third, Fourth, Fifth, Sixth, Seventh and Eighth articles of the libel.

Second.—It admits each of the allegations of the Ninth article of the libel except the allegation that

> "Under the terms of the respondent's insurance the respondent has become liable to pay 27,690/212,000ths of said $49,088.94 which amounts to $6,669.19".

It admits that under the terms of its insurance it has become liable to pay 49,088.04/417,178.00ths of $27,690, with interest thereon from the 24th day of February, 1916, but denies on information and belief that it has become liable to pay 27,690/212,000ths of $49,088.04 or any amount in excess of said 49,088.04/417,178.00 of $27,690, with interest.

Third.—It admits the allegations in the Tenth and Eleventh articles of the libel.

Fourth.—It denies on information and belief each and every allegation contained in the Twelfth article of the libel except that it admits that pay-

28 ment of the sum of $6,669.19 together with interest has been demanded from it by the libelant and that payment of said amount has been refused.

And further answering, it alleges that the value of the cargo of the S. S. "Gulflight" including in such value the amount made good in the general average statement referred to in the libel was at the termination of the voyage of the "Gulflight" $417,177.64 and that in the general average statement the said sum of $417,178, was treated as the contributory value of said cargo and the contribu-
29 tion to be paid by said cargo to wit, $49,088.04 was fixed and determined upon the basis of the cargo's said value of $417,178, and this respondent by its policy of insurance which is hereto annexed and marked "Exhibit A" and made a part hereof insured upon said cargo only the sum of $27,690, and that the contract of insurance evidenced by said policy was made and said policy was issued in the State of New York and the legal effect thereof is determined by the law of New York and the custom, usage and practice in the State of New York with reference to which such contract was
30 made and said policy issued; that by the Law of New York and by the long continued and uniform usage, practice and custom prevailing in New York at the time said contract was made and said policy issued, an insurer upon cargo was liable with respect to general average charges against the same only for the proportion of the amount insured by said insurer that the general average charge against the cargo is of the contributory value of the cargo and said contract was made and said policy was issued with reference to said usage, practice and custom; and this respondent by reason of the mat-

ters set out in the libel became liable to pay only the proportion of the amount insured by it, to wit, $27,690, that the amount to be contributed by the cargo, to wit, $49,088.04, bore to the contributory value of the cargo, to wit, $417,178, that is to say this respondent became liable to pay only 11.7669% of $27,690, or $3,258.25, with interest thereon from the 24th day of February, 1916, which sum with interest as aforesaid this respondent is ready and willing and hereby offers to pay. 31

WHEREFORE, this respondent asks that upon payment by it of the said sum of $3,258.25, with interest thereon at the rate of 6% from the 24th day of February, 1916, the libel against it be dismissed with costs. 32

CARTER, LEDYARD & MILBURN,
Proctors for Respondent,
Atlantic Mutual Insurance Company,
Address & P. O. Address,
54 Wall Street,
Borough of Manhattan,
New York City. 33

State of New York,
County of New York, } ss.:

Cornelius Eldert, being duly sworn deposes and says that he is the President of the Atlantic Mutual Insurance Company the respondent named in the above entitled action; that he has read the foregoing answer and knows the con-

34

tents thereof and that the same is true to the best of his knowledge, information and belief.

CORNELIUS ELDERT.

Sworn to before me this
17th day of July, 1918.

ERNEST BAKER,
Notary Public,
(Seal) Kings County.
Certificate filed in New York County.
Commission expires March 30, 1919, No. 431.

35

Order of Reference to Commissioner.

At a Stated Term of the District Court of the United States for the Southern District of New York, held at the United States Court Room in the Old Post Office Building, Borough of Manhattan, City of New York, on the 28th day of March, 1925.

36 Present.—Hon. HENRY W. GODDARD, District Judge.

GULF REFINING COMPANY, Libelant, against ATLANTIC MUTUAL INSURANCE COMPANY, Respondent.	64—82.

Upon the pleadings heretofore filed herein, and upon the annexed consents, and upon motion of

37

Kirlin, Woolsey, Campbell, Hickox & Keating, proctors for the libelant herein, it is

ORDERED that the above case be referred to Van Vechten Veeder, Esq., as a Commissioner of this court, to hear evidence and the argument of counsel and to report to this court his findings of law and of fact and the amount, if any, due in this litigation and file his report, subject to the provisions of Admiralty Rule 27 of this court together with the evidence taken.

38

HENRY W. GODDARD,
U. S. D. J.

We hereby consent to the entry of the foregoing order.

KIRLIN, WOOLSEY, CAMPBELL, HICKOX & KEATING,
Proctors for Libellant.

CARTER, LEDYARD & MILBURN,
Proctors for Respondent.

39

40 **Testimony Before Commissioner.**

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

GULF REFINING COMPANY,
Libelant,
against
ATLANTIC MUTUAL INSURANCE COMPANY,
Respondent.

41

Before.—VAN VECHTEN VEEDER, Esq.,
Commissioner.

Hearing held at the office of the Commissioner, 27 William Street, New York City, March 17th, 1927.

APPEARANCES:

Messrs. KIRLIN, WOOLSEY, CAMPBELL, HICKOX & KEATING (Mr. Campbell and Mr. Siddell), for
42 the libellant.

Messrs. CARTER, LEDYARD & MILBURN (Mr. Lyeth and Mr. Johnson), for the respondent.

Mr. Campbell: Practically all of the facts have been admitted in the case under the pleadings. There has recently turned up a slight discrepancy in the figures, it appearing that all of the oil which was included in the $417,000 valuation was not covered by their policy and we have entered into a separate stipulation which corrects that error,

43

which you can disregard so far as you are concerned and treat the situation as stated under the average adjustment as though the valuation of the cargo was $417,000. I have the average adjustment here which I file with Judge Veeder together with these papers. That makes out a prima facie case, so far as we are concerned.

Mr. Lyeth: For the purposes of this case, to simplify the arithmetic, I think you can disregard the fact that the Atlantic Mutual insured only part of the valuation stated in the policy. If we assume that there is just one underwriter it eliminates a couple of fractions. I have prepared a memorandum and appended to it a chart of the authorities in the various jurisdictions, which I will leave with the Commissioner.

44

The taking of the oath by the Commissioner is waived.

Mr. Lyeth: I offer in evidence the deposition of Andrew G. Lange taken in Chicago, February 28th, 1927.

It is marked Respondent's Exhibit A.

Mr. Lyeth: I offer in evidence the deposition of Edgar G. Gaudesaboos, taken March 20th, 1925.

45

It is marked Respondent's Exhibit B.

CORNELIUS ELDERT, being duly sworn and examined as a witness for the respondent, testified as follows:

By Mr. Lyeth:

Q. Mr. Eldert, what is your occupation, you are president of the respondent, the Atlantic Mutual? A. Yes.

46 Q. How long have you been president? A. I think since 1915, I am not sure about the date—several years.

Q. How long have you been connected with the Atlantic Mutual Insurance Company? A. Since December 1865.

Q. Did you enter the loss department of the company? A. I did finally, not at first.

Q. Well, just briefly relate the various positions you had and approximately the time? A. Well, I started as junior clerk—errand boy—then I had to
47 do with the recording of disasters in what we call the disaster book, from there I went to the entry of risks on the records of the policies, and from that position I went to the loss department and continued there until I was appointed second vice president in 1897, since that I have been in an official position in the company, from second vice-president I became vice-president and then president, it was later, however, than 1915, it was toward the close of the war that I became president—after the war.

Q. Were you after you became second vice-president, were you in charge and supervision of the
48 loss department? A. Yes.

Q. And prior to that time you had been in charge of the loss department? A. Yes.

Q. Was it part of your duties to determine or to pass upon the payment of general average contributions? A. Yes—speaking now of the time I was in the department?

Q. Yes. A. Yes.

Q. Will you state, Mr. Eldert, what was the practice of the Atlantic Mutual prior to 1910 with respect to the payment of general average contributions to assured on cargo where the contributory value was in excess of the insured value?

49

Mr. Campbell: I object to that question if the Commissioner please.

Objection sustained. That wouldn't establish any custom if that is what you are after.

Mr. Campbell: That is the purpose of the objection.

The Commissioner: Are you endeavoring to establish a custom?

Mr. Lyeth: Yes.

The Commissioner: I don't think the practice of one particular insurance company—

50

Mr. Lyeth: I propose to lay the foundation to show it by other insurance companies and will follow that by showing actual cases running over a period of many years of actual payments and the assured acceding to them, and follow that up by others.

The Commissioner: Exactly what is the purpose of the question, if it has any bearing on his qualifications, of course it is admissible.

Q. Mr. Eldert, in cases where—general average cases where the contributory value was higher than the insured value, did the Atlantic Mutual Insurance Company pay the entire amount of the general average contribution?

51

Mr. Campbell: Objected to on the same grounds, you cannot prove it that way.

The Commissioner: Same ruling.

Mr. Lyeth: I don't understand how you can prove a practice or custom without showing—

The Commissioner: Ask him if he knows, it would have to be the custom, not the prac-

52 tice of the Atlantic—if he knows the custom in this respect in the insurance companies at any particular date, that is another matter.

Q. Do you know what the custom among underwriters and the insurance companies was in New York with respect to the payment of general average contributions where the contributory value was higher than the insured value prior to 1910?

53 Mr. Campbell: It seems to me still that the question is not in proper form, he has to first establish whether this witness knows if there was any general custom prevailing on this subject in New York.

The Commissioner: Ask him that, Mr. Lyeth, that would be the logical way to go about it.

Mr. Lyeth: I submit that it is certainly some evidence of custom, your Honor, the custom would be established by what the underwriters did and what one underwriter universally did is at least some evidence of
54 the custom which can be deduced from what the others did.

The Commissioner: The only inference I can draw from your examination thus far is that he is aware of what the Atlantic Mutual Insurance Company did but whether he has any general knowledge of the uniform practice among other companies I am still unaware—it is just the logical way of getting at it, that is all, presumably he knows.

Q. Do you know what the custom among underwriters was prior to 1910 in this regard? A. The custom was to apportion—

55

Q. You do know? A. Yes.

Q. Will you state what the custom was? A. What do you mean?

Q. The custom as to the payment of general average contributions where the contributory value was higher than the insured value? A. It was to apportion the general average between the insured, the value and the excess of the insured value, that is carried into the contributory value—each would pay its own proportion.

Q. What do you mean by each would pay its own proportion? A. The underwriter would pay the 56
proportion that related to the insured value and we assume that the assured would pay the balance—we left it to the adjusters.

Q. Was that practice followed by the Atlantic Mutual Insurance Company?

Mr. Campbell: Objected to as immaterial.
The Commissioner: That is all right.

A. Yes.

Q. How far back, Mr. Eldert, can you recall that this practice was followed? A. Well, I should say 57
50 years back or more, from this time.

Q. That is from the present time? A. From the present time.

Q. Mr. Eldert, have you had prepared from the books of the Atlantic Mutual Insurance Company a list of cases where the Atlantic paid only the proportion of general average contributions? A. Yes, there has been such a list prepared.

Q. Is that the list? A. Yes, that is the list.

Mr. Lyeth: I offer it in evidence.
Mr. Campbell: I reserve my objection un-

58 til I have a chance to cross examine Mr. Eldert on it.

The Commissioner: Mark it for identification.

It is marked Respondent's Exhibit C for Identification.

Q. Mr. Eldert, do you know what the practice has been among underwriters with respect to the refunding to the assured of proportions of credits in general average received by the underwriter
59 where the contributory value was in excess of the insured value?

Mr. Campbell: I object to the question on the same grounds as heretofore, not proving custom.

Mr. Lyeth: I asked him if he knew.

By the Commissioner:

Q. Do you know of any general custom in that respect? A. I have knowledge of what we did ourselves, I believe that conforms to custom, that is
60 as near as I can come to it.

The Commissioner: That shows the basis of the objection. It is a little different from the usual situation because I apprehend that in the case of this document just offered, that it would show not only what the Atlantic Mutual Insurance Company did on these average adjustments but would show also what other companies involved in the adjustment did, I don't know whether it does or not.

61

Mr. Campbell: Not at all, all it shows as I get it is simply this, if I read it right. It is a compilation showing the record number, the folio, the name of the adjuster, the name of the vessel, the date of the casualty, who the assured was, the total of the general average and the amount of general average paid by the Atlantic Mutual Insurance Company —there may have been a hundred reasons why they short paid, we don't know.

The Commissioner: Yes, that wouldn't do. The difficulty with your examination 62
thus far is that you are aiming to establish general custom by the practice of one company, which of course won't do.

Mr. Lyeth: Mr. Eldert has testified with respect to general custom, I am following it up to show what the underwriter did.

The Commissioner: What this underwriter did.

Mr. Lyeth: Yes, for a series of years. Your Honor should bear in mind that the fact that the assured paid or did not demand further payment is at least some evidence of the 63
universality of the custom—the assured and the brokers. As a matter of fact that is what I wanted to go ahead and show that the brokers generally went back to the assured and got the difference.

The Commissioner: Of course in my present capacity I am not trying to enforce any technical rules but the other way to go at it would be to permit you to go ahead and show what you could and then find out what you have proved, but that is always the longest way around and may get nowhere. Custom

64 is one thing and practice of one particular underwriter is another.

Mr. Lyeth: What I expect to show is the practice of several underwriters in New York and elsewhere, I don't know, it may be somewhat roundabout but I wish you would give me a chance to show how universal it was—otherwise it makes it impossible for me to show the custom. This isn't the sort of thing that you can establish except by what actually happened in practically all of
65 the cases by the experience of men who were in that business.

Mr. Campbell: I still object to the question.

Objection sustained.

Mr. Lyeth: Do I understand you to rule this out (referring to Exhibit C for Identification)?

The Commissioner: No, Mr. Campbell has reserved the objection on that Exhibit C till he cross examines the witness.

66 By Mr. Lyeth:

Q. Referring again to Respondent's Exhibit C for Identification, Mr. Eldert, are the cases as set forth in this Respondent's Exhibit C for Identification cases where the contributory value was in excess of the insured value? A. Yes, they are, that is the purport of the thing.

Q. And that was the reason, was it, why the total of the general average contribution was not paid? A. Yes.

Mr. Campbell: Are you answering the question or putting it—how can this man

67

remember at this time 300 or 400 cases going back 30 or 40 years, as to why $1.57 wasn't paid, he can't do it, no human being can—back in 1880 $1.27, look here.

The Commissioner: I don't understand that the witness would undertake to remember the amounts in each particular case, he has been asked as I recall whether it is a correct transcript from the books of the company.

Mr. Campbell: That I don't question that the figures were taken from the books of the 68
company. This question was as to why deductions were made.

The Commissioner: Is this document sufficient in itself to enable you to answer this question that you have just undertaken to answer—does it disclose—

A. (Continued) That document was compiled from our records for the purpose of getting this information, I didn't compile it myself, it has been compiled.

69

By the Commissioner:

Q. Does it enable you to say why deductions were made in each particular case? A. Yes, because that was the object of the compilation to show what deductions were made in cases of this character.

Q. What deductions were made, yes, but— A. To show that deductions were made in cases of this character.

70 Cross Examination by Mr. Campbell:

Q. Mr. Eldert, you don't assume to say to the Commissioner that you have any personal knowledge as to the facts in any of these cases set forth in the record? A. Not at the present date, those cases were largely dealt with to an extent by myself and taken from our records, but my memory does not run to any individual cases.

Q. Exactly—you couldn't say to the court today from any present recollection that you have as to
71 why these deductions were made in any given case? A. I think so because that list was prepared of said deductions and no others.

Q. That is because you gave an order of that sort? A. Yes, to have a list of deductions made in cases similar to this, and that is the list.

Q. But you have no personal recollection of the reasons for the deductions, all you know is you gave certain orders? A. The deductions in that list were made for one purpose only, where the insured value was insufficient to cover the contributory value.

72 Q. You told someone in your office to go through the records and make up a compilation of that character? A. Yes.

Q. This is what was produced? A. Yes.

Q. That is all you know about it? A. Yes.

Mr. Campbell: I object to the introduction of it as proving the custom.

The Commissioner: I understand you have another witness here?

Mr. Lyeth: Yes.

Q. Mr. Eldert, your testimony about practice or custom is confined to knowledge of what your par-

ticular company did, isn't it? A. It is definitely, but it was understood that there was such a custom, I have always understood there was among underwriters. 73

Q. But you don't pretend to testify as to any personal knowledge of what other underwriters did in the port of New York? A. No more than the the general exchange from time to time of views and practice, that is all.

Q. So that aside from your knowledge as to what your own company may have done, the rest of your testimony is opinion and belief as to what others may have done? A. It is opinion and belief based upon statements made by other underwriters as to their practice. 74

Q. Statements given to you in general conversation? A. Yes, personally.

Q. But you don't pretend to say that other underwriters in the port of New York made settlements right along on the basis of insured values, do you? A. I don't pretend to know anything about what they did.

Q. That is exactly the point? A. I only know what they stated was their practice. 75

Q. How many times have you had that statement made to you over the last 50 years, half a dozen? A. Fully that, I don't know how many.

Q. There may have been all sorts of practices one way or the other among the hundred or more underwriters in New York so far as you know—how many underwriters are doing business in New York? A. I don't know, I suppose there have been 50 in the last half century.

Q. How many were doing business in New York in 1916? A. 1916?

76 Q. Yes. A. Well, I don't know, 25 or 30 perhaps.

Q. Not more than that many companies doing business? A. I doubt it very much, I don't know exactly.

Q. You don't make any pretence to a personal knowledge as to what was the practice of all these underwriters in settling their losses in New York? A. No, I don't pretend to do so.

Q. They may have paid upon the basis your company did or they may have paid upon the basis
77 upon which we are asking your company to, so far as you know? A. I have no knowledge what they did.

Q. Do you insert in your policies any clauses or provisions stipulating for settlement on the basis of your contentions here? A. No.

Q. Such clauses are written into such policies, are they not? A. There have been since the Maldonado case.

Q. Do you do it in your policies now? A. No, we do not.

Q. Have you ever done it? A. No.

78 Q. What companies are doing it now? A. I don't know anything about what companies.

Q. Then when you say since the Maldonado case you are testifying from what somebody else has told you? A. Yes, it is in the hull policies—a form of hull policies which have it, but that relates to the vessel, not to the cargo, if I were to make a statement I would suggest perhaps the Boston Insurance Company put such clauses in their policies with respect to cargo.

Q. Did you ever know in your experience in the underwriting world, Mr. Francis B. Dixon? A. No, he died so many years ago, even before my time, I have read his book.

79

Q. Are you familiar with his book? A. I have seen his book.

Q. He was one of the leading average adjusters of his time in New York? A. I don't know that he was, he was a prominent average adjuster, I wouldn't say he was a leader.

Q. Did you ever know the author of Phillips on insurance? A. I never knew Phillips, I have seen his book and read it.

Q. Always recognized as a leading work among underwriters? A. Yes.

Q. Did you ever know Mr. Gow when he was over here? A. Yes. 80

Q. What position did he occupy in the New York underwriting world? A. I think he was agent for the London Assurance.

Q. That is the same Gow who is the author of that book on insurance? A. Yes.

Mr. Campbell: I move to strike out Mr. Eldert's testimony as to the practice of other underwriters than himself, being based purely upon hearsay.

By the Commissioner:

81

Q. First I would like to know, so far as your information goes, do I understand you to say that the practice among underwriters has been uniform here for the last 50 years—has there been no change since say 1910? A. I know of no change, but I cannot testify as to the uniformity of the action of other underwriters because I am not admitted to their confidence.

By Mr. Lyeth:

Q. Judge Vessler is referring to a change since 1910? A. Oh, since 1910 my belief is that other

82 underwriters have rather wavered from making these apportionments that have been spoken of, because of the California decision.

By the Commissioner:

Q. Even on the basis of the information that you have, you would, I understand you to say, not regard it as being universal since 1910 here? A. No, I wouldn't say it was universal since 1910—that is the change I am speaking of now, not the prac-
83 tice, but it would refer to the practice too for that matter—since 1910 the practice has been somewhat interrupted, there has been no uniformity.

Mr. Lyeth: That is because of the Maldonado decision.

The Commissioner: Whatever the motive, either there was a custom or there wasn't. I will reserve decision on the motion to strike out the testimony.

Re-direct Examination by Mr. Lyeth:

84 Q. Mr. Eldert, were Johnson & Higgins the broker in this Gulf Light case? A. Yes.

The Commissioner: That is the case at issue here.

Mr. Lyeth: Yes, the case that is at issue here.

Q. Can you recall whether any of these cases that you had under your supervision where the general average contribution was not paid in full by the Atlantic Mutual because of the excess contributory value, were cases where Johnson & Higgins were collectors and adjusters?

85

Mr. Campbell: Objected to as immaterial.

A. They were.

Q. Was any objection made by Johnson & Higgins to your method of treating those adjustments?

Mr. Campbell: Objected to as immaterial.

A. I don't recall any.

86

The Commissioner: I don't see the probative effect of it, but let it go.

Re-cross Examination by Mr. Campbell:

Q. You spoke about Johnson & Higgins not making complaints you have not been receiving personally all of the complaints and criticisms made by brokers on collection of these losses, have you? A. No, but I am speaking of the time when I did personally come in touch with such conditions.

Q. And if you deducted $1.37 from a claim, why they just swallowed it? A. I don't know what they did, they didn't collect it from us. 87

ALBERT ULLMANN, being duly sworn and examined as a witness for the respondent, testified as follows:

By Mr. Lyeth:

Q. What is your business? A. Marine underwriter—marine agent.

88 Q. How long have you been in that business? A. 35 years.

Q. Have you been engaged in settling losses in general average and general average contributions in that time? A. Yes, sir.

Q. What company are you with now? A. The North British & Mercantile Insurance Co., Ltd., The Commonwealth Insurance Co. of New York, The Mercantile Insurance Co. of America, The Pennsylvania Fire Insurance Co., the New Zealand Insurance Co., Ltd., the National Union Fire In-
89 surance Co. of Pittsburgh.

Q. You have been in New York all of this time, the last 34 or 35 years? A. With very few exceptions I have been operating in New York, marine insurance, except periods I have been out for business and pleasure.

Q. Do you know, Mr. Ullman, what the practice was in New York prior to 1910 and from 1910 to 1915 with respect to the settlement by underwriters of general average contributions on cargo where the contributory value of the cargo was higher than the insured value? A. Yes, sir.

90 Mr. Campbell: I object to the question as being immaterial.

By the Commissioner:

Q. We won't stand on words, you were asked about practice, among lawyers we call it custom, that means that you have regard to its uniformity and not the particular practice of individual companies—was that the uniform practice? A. It was uniform in this country as well as universal.

By Mr. Lyeth:

Q. What was that custom or practice? A. If the contributory value was greater than the insur-

91

ance value the assured would have to pay the proportion that the contributory value bore to the insured value.

By the Commissioner:

Q. Before we go any further may I ask you now with reference to what period you are testifying, has that been always so in your experience down to date? A. Yes, sir.

By Mr. Lyeth:

92

Q. That was true between 1910 and 1915? A. Yes, sir.

Q. How many cases of this character involving general average where the contributory value was greater than the insured value have you settled?

Mr. Campbell: Objected to as immaterial what this man does in his individual practice.

The Commissioner: Well, this relates to the extent of his experience, he may answer that.

93

A. There may have been 2,000, there may have been 5,000, they were so innumerable I can hardly remember, only this week I had three cases that I settled on that basis.

Cross Examination by Mr. Campbell:

Q. Prior to your connection with the present group of companies, with what company were you associated? A. I was associated originally with Jones & Whitlock who represented the Union Marine Insurance Company, Ltd. of Liverpool and

94 the Columbia Insurance Company of New Jersey, after being 13 years with them I joined F. Herman & Company who represented the Firemen's Fund Insurance Company of San Francisco, the Manheim Insurance Company of Manheim, Germany, the North Deutsch Insurance of Hamburg, the Scandinavian American Insurance Company, the Union Marine Insurance and the Phoenix Assurance of London.

Q. You would not pretend to say that during the years prior to 1910 you had not settled with as-
95 sureds on the basis of the valuation in the policies where the contributory value of the cargo was higher than the stipulated value of the policy, would you? A. I would positively say that I hadn't.

Q. Never have done it in a single instance? A. No.

Q. You have no personal knowledge as to what other insurance companies were doing during that period, have you? A. I had no personal knowledge from examination of their books, but it was such a universal custom nobody ever presented a claim of that character.

96 Q. The fact is you have no personal knowledge of what other underwriters were doing in the settlement of their losses? A. Except as we would have a reinsurance bill presented to us by other companies where we would reinsure them, we know they didn't pay from time to time.

Q. Aside from that have you any personal knowledge of what other companies were doing? A. Absolutely not.

By the Commissioner:

Q. When you answered my question about uniformity, you had reference to your own company's

97

practice? A. And from experience gained writing reinsurance for other companies.

By Mr. Campbell:

Q. So far as you know there may have been a very considerable group in New York during that period that were paying on the basis of the insured value of policies instead of on contributory values where the contributory values were higher, isn't that so? A. I don't understand.

98

Q. There may have been a considerable number of underwriters during that period prior to 1910 paying on the basis of the insured values of their policies? A. Where the contributory value was higher?

Q. Yes. A. Absolutely.

Q. Do you mean to say that since 1910 up to the present moment there is a fixed definite custom, general in New York for underwriters to pay upon the basis that you have stated? A. Paying the proportion that the insured value bears to the contributory value, yes sir.

99

Q. Then what becomes of your statement to Mr. Lyeth, your assertion that there wasn't any custom —did you mean to say that all underwriters are doing that or that you are doing it? A. I am doing it and the underwriters I am doing business with, that I have treaties from.

Q. But you don't know what the practice is among other underwriters? A. I can't say, I have no reason to know except the people I have actual business dealings with.

Mr. Campbell: I move to strike out all his testimony relating to prior to 1915 as being entirely immaterial in this case.

100

The Commissioner: I will wait and see till we get all the testimony in on this line.

By the Commissioner:

Q. I understand you to say then that in your experience and knowledge there has been no change in the method since 1910, no difference between the time since 1910 and prior thereto? A. No change so far as my practice is concerned and those that I come in contact with.

101

JOHN A. JEREMIAH, being duly sworn and examined as a witness for the respondent, testified as follows:

By Mr. Lyeth:

Q. Mr. Jeremiah, are you in business now? A. No, I got out of business 1910, retired.

Q. You have been retired since 1910? A. Yes, the 1st of January, 1910.

Q. What was your business prior to that time?
102 A. Marine underwriters, Platt & Jeremiah, agents of the Insurance Company of North America.

Q. Agents of the Insurance Company of North America? A. Yes.

Q. How long had you been in the marine insurance business? A. I have been in that company since 1876 or 1875.

Q. And before that where were you? A. In that office since 1875 or 1876, grew up in it, you might say.

Q. Did you have experience where you engaged in the settlement of general average losses? A. Yes, sir.

103

Q. Where the contributory value of cargo was greater than the insured value? A. Yes, sir.

Q. Do you know what the practice in New York was with respect to the settlement of general average contributions on cargo where the contributory value was higher than the insured value? A. Yes, sir.

The Commissioner: Was when?

Mr. Lyeth: When he was in business prior to January, 1910.

Mr. Campbell: I object to that testimony as immaterial, and further object to the question on the ground that it is not a proper question to prove custom. 104

The Commissioner: I think both objections are good.

Mr. Lyeth: The question was whether he knew there was a custom.

The Commissioner: Prior to 1910. But within reasonable limits it seems to me my duty as a Commissioner to give the court the testimony of which I rule so that if the court holds I am in error they have the testimony before them and don't have to send back again. I would rather let the witness answer and you can make the same motion with respect to this testimony that you have made with respect to the other, to strike it out. 105

Q. What was the custom or practice? A. We paid the amount of liability under policies of insurance which was the proportion of the contributory value as the contributory value bore to the insured value, that is, if the contributory value was more we paid that proportion which fell to the insured

106 value and the merchants would be called upon by the adjusters to pay the balance.

Q. You are speaking of policies on cargo? A. Yes, sir.

Q. Would you say that that was a universal custom? A. Yes, sir, all my knowledge is, there was nothing else but that done.

Q. Do you recall of any exceptions to that practice or custom?

Mr. Campbell: Same objection to this line
107 of testimony.

A. No, I don't recall any.

Cross Examination by Mr. Campbell:

Q. You wouldn't say, Mr. Jeremiah, there were not exceptions, would you? A. No, sir, I couldn't say to anything I don't know, of course.

Q. And your knowledge is confined to what you were doing in your own particular company, isn't it? A. Immediate knowledge, yes, and from what I understand was done generally in business.

108 Q. Well, what you believe was generally done? A. Well, more than a belief, it comes from a sort of contact, you know, business transactions.

Q. You had no personal knowledge as to what other companies were doing in the settlement of these losses, had you? A. No.

Q. You know that in your own company you insisted upon settlements upon the basis which you have stated in most cases? A. Well, that is the settlement we made, we didn't make any other than we were liable for.

Q. The differences were usually small in those days, weren't they? A. Oh, generally, yes, the gen-

109

eral rule was that the insured value was as much or greater than the contributory value; it was only exceptional or occasionally there was any difference.

Q. It was for years and years a rare instance where a question of this character would come up? A. I don't say rare, but out of the great number of cases it wasn't the majority, it was a small number of the total against the cases the contributory value would be more than the insured value.

Q. You are not old enough to have had acquaintance with Phillips? A. No.

110

Q. Did you know Mr. Gow when he was here? A. Yes, very well.

Q. How long would you say Mr. Gow, the author of the work on insurance, was engaged in business in New York? A. Well—

Mr. Lyeth: I object, I don't see what materiality that has.

The Commissioner: I don't see that it makes much difference one way or the other.

A. I think the best part of 10 years.

111

Q. During what period of years? A. Why, I think as my memory goes, that he went back to the other side somewhere about 1905, somewhere about that.

PERCY G. CRAIG, being duly sworn and examined as a witness for the respondent, testified as follows:

By Mr. Lyeth:

Q. What is your occupation? A. Marine insurance.

112

Q. Are you the head of the loss department of the Atlantic Mutual Insurance Company, the respondent? A. The loss manager.

Q. I show you respondent's Exhibit C for identification and ask you whether you have compared that document with the entries on the books of the company of which it purports to be a copy? A. Yes.

Q. Do the cases or payments of general average losses that are set forth there represent general average contributions where the contributory value
113 was higher than the insured value? A. Yes, they do.

Q. How do you know that? A. From observation of the records.

Q. Are you able to state from your examination of the books of the company what the reason was that the total general average contribution shown in the column headed Total G/A, was not paid?

Mr. Campbell: Objected to as immaterial whether he can state it or not, so far as this case is concerned.

The Commissioner: He may answer it.

114

A. Yes, I can so state.

Q. Please state.

Mr. Campbell: I object to the question as being immaterial, irrelevant and incompetent in this case.

The Commissioner: He may answer.

A. I cannot state with regard to each item, but on examination of the records in checking this up I often found that the amount of the contributory

115

value, it was stated under the rule of three, the amount of contributory value compared with the amount of the general average as the amount of the insured value compared with the amount paid according to this suit.

Q. Does the column marked Proportion of G/A Paid, represent that proportion? A. Yes.

Q. In each case? A. In each case.

Q. Can you state whether that is a correct transcript of the entries of the books of the company with respect to the transactions set forth there? A. It is a correct transcript.

116

Mr. Lyeth: I offer it in evidence.

Cross Examination by Mr. Campbell:

Q. Mr. Craig, you have no personal knowledge yourself as to the settlements of any of these cases, have you? A. None whatever.

Q. All you did was to go to the records and take off a transcript? A. I checked it, I didn't personally take it, it was done in 1920, I didn't take it myself.

Q. Have you ever compared the transcript with the records? A. I personally compared every item. 117

Q. And the records show that in each of these cases the amount that was paid to the assureds with respect to general average contributions levied on the insured cargo were less than the contributions which the cargo owner had paid to the general average? A. I might say those amounts were not necessarily paid to the assured, in most cases they were paid to the adjusters.

Q. Or to the adjusters? A. Yes.

118 Q. You have no personal knowledge as to why the short payments were made, have you? A. I have no personal connection with the settlements.

Q. There may have been all sorts of reasons for compromises so far as you know? A. I know nothing about the settlements.

Mr. Campbell: I object to the record being offered.

By Mr. Lyeth:

119 Q. You can say from the records themselves what the transaction was, can you not? A. I can state what the records show.

Q. And you have so stated? A. I have compared it and so stated.

By the Commissioner:

Q. You said in many of the cases, you did not refer to all the cases? A. I meant that the rule of three was not figured in each case but in so many cases that it established in my mind the reason for
120 a deduction of the amount.

By Mr. Campbell:

Q. Then you are guessing at a large number of these? A. Well—

The Commissioner: Well, he is drawing an inference.

A. (Continued.) Put it that way.

Q. How was this made, under your supervision? A. No, I was not the loss manager at the time.

121

Q. You never made any effort to look through your cases for possible payments on the other basis for which we are contending here? A. No.

Mr. Lyeth: I don't understand the question.

Mr. Campbell: Our contention is that as set forth in the pleadings that the underwriter should pay his assured such proportion of the general average contribution as the amount of the insurance bears to the insured value in the policy.

122

Q. With that statement as to what our contention is, you didn't examine any of the records to determine whether or not the Atlantic Mutual had settled on that basis, did you? A. I checked that list and in so doing examined the records, if that is what you mean.

Q. But you didn't go through the records to see whether settlement had been made on the basis which we are contending here? A. Personally no, I confined my work to checking the list.

Mr. Campbell: I object to the admission of the list. 123

By Mr. Lyeth:

Q. Did you go over all of the other payments of general average contributions? A. In checking the list I did in a cursory way, but I didn't make an examination of the records.

Q. Did you find any settlements where there had been a short payment on account of excess contributory value not contained in this list? A. Yes.

124 The Commissioner: I will wait on the ruling until I see whether there is anything else offered.

Q. Could you draw any other inference, Mr. Craig, as to the reason for short payment than that the contributory value was in excess of the insured value?

Mr. Campbell: Objected to as calling for an opinion on his ability to draw an inference.

125 The Commissioner: Let us see what he says.

A. Yes, I could have other basis for such inference, if that is what you mean.

By the Commissioner:

Q. What is it? A. It is the practice in drawing off sheets for general average purposes in our office where the contributory value exceeds the insured value, to put a circle around the contributory value on the sheet and in the cases which I examined I
126 cannot say all of them, but practically all had a circle drawn around the contributory value.

By Mr. Lyeth:

Q. And that indicated that the contributory value was in excess of the insured value? A. It did.

By Mr. Campbell:

Q. But that does not indicate the motive of the payment by the assured, does it—is there anything

127 in your books that would show us as to why the assured accepted those short payments?

Mr. Lyeth: He didn't say he paid the assured.

Q. (Continued.) Or the adjusters, it is the same thing? A. I don't see how I can speak for the assured.

Q. You cannot speak for the adjusters, either, can you?

128 The Commissioner: Would it be a little more definite as to the adjuster than it would be as to the assured, with the assured he is dealing with the principal and there might be a variety of reasons any one of which appearing conclusive to them they would act on, but the adjuster's position is a little different.

Mr. Campbell: The adjuster has nothing to do with relation between the assured and the underwriter.

The Commissioner: I mean the adjuster hasn't much latitude unless he communi- 129 cates with his principal, he has no authority to accept a short payment.

Mr. Campbell: He has no power to bring suit on these small amounts, these underwriters will arbitrarily send a check for that small amount in all these cases; they are picayunish; if you will look at these cases you can see what happened; they are all small, $1.10, $2.79, $10.69; they will send their check for the short amount and what can you do? They swallow their pride. It

130 doesn't pay them to go into court. These records prove nothing so far as custom is concerned.

The Commissioner: Of course, that is the main objection, that they prove the practice of this particular underwriter and do not prove the custom for which they are offered.

Q. How long have you been in the loss department? A. Since 1908, I think.

Q. Aren't the cases where the question arises
131 rather rare? A. Comparatively so.

By the Commissioner:

Q. That would apply to the number of cases here which you found with a ring around, they would be comparatively small as compared with the total number of entries on Exhibit C? A. Every entry on Exhibit C there would be a ring around it on our record.

By Mr. Campbell:

132 Q. There were lots of other records didn't have a ring around there? A. There was no cases of contributory value over insured value.

CORNELIUS ELDERT, recalled.

By Mr. Lyeth:

Q. Mr. Eldert, in your experience with respect to the transactions on Exhibit C, and your experience in the company itself and in settling these

losses, do you recall any difficulties with the adjusters or the adjustment department or the collecting department of the brokers or adjusters with respect to the payment short? A. I do not. 133

Mr. Campbell: I move to strike it out as immaterial.

Q. Well, will you state whether or not if the adjuster was unable to collect the balance from the assured he would have been likely to come back to the insurance company, and why? 134

Mr. Campbell: Are you making a statement of that or asking a question?

A. We would expect him to come back to the insurance company because he held our guaranty, in order to get the goods released we are obliged to guarantee the performance of the average bond; if he failed to collect under the bond for any cause they would come back to us as guarantor, but I do not recall a single case where they came back.

By Mr. Campbell: 135

Q. That is, the cases that you dealt with you don't remember a single case? A. The cases I dealt with and the cases that would be reported to me, I don't remember a single instance.

Q. As president and vice president you weren't having these cases involving dimes and nickels, were you? A. No, but if such an unusual occurrence occurred they would come to me about it, certainly.

Q. When your company gives a guaranty, what is it—or is it not an agreement that it will pay the

136 general average contribution which is levied against the cargo? A. It is, and when we give that we don't know anything about the relation between the contributory value and the insured value; it is done as a practical matter to get the goods released.

Q. All right, your company as an insurance company gives an adjuster or trustee its undertaking that it will pay the general average levied against that particular cargo, is that true?

Mr. Lyeth: May I raise the question here,
137 this seems to be arguing with the witness as to the effect of a written document?

Mr. Campbell: It is a little leading, perhaps.

The Commissioner: That is the only objection to it.

Mr. Lyeth: It is guaranteeing the performance of the average bond.

Q. When your company gives a general average guaranty it gives an undertaking that it will pay the general average contribution that is levied against the cargo to which the guaranty refers—
138 yes or no, isn't that what it is? A. Yes—with qualifications.

Q. What qualifications? A. The qualifications that they shall take the average bond.

Q. That they shall take the average bond? A. Yes.

Q. Well, supposing it turns out that the contributory value is higher than the insured value, do you mean to say that your company would not perform its general average guaranty but would claim the right to short payment? A. We have had many such cases; in the first instance, we would pay

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apart from our guaranty, and if they don't collect from the consignee they have the right to come back; then it is for us to proceed against the consignee.

Q. Then when you give a guaranty you give a guaranty that you will pay the cargo's contribution, you are giving an instrument that your company does not intend to perform until an attempt is made to collect the portion of the contribution from the consignee? A. We guarantee the payment by the consignee of the average charges under the average bond, if he does not collect them then it becomes a 140
secondary obligation against us.

Q. If he does pay it—if the consignee pays it, then he comes back again to your company under your company's policy? A. Exactly.

Q. But whenever you make payments to the adjuster or trustee under your guaranty you pay the full contribution, don't you? A. No, sir.

Q. And look to your assured for payment back to you of the excess? A. We don't; you are speaking of our practice; we pay short.

Q. You pay short? A. Yes.

By the Commissioner: 141

Q. In other words, as I understand it, your obligation is based on the amount that is lawfully due? A. That is it.

Q. The adjuster's amount is not conclusive on you? A. No, the amount due under our policy.

By Mr. Campbell:

Q. That is the basis on which you obtain the release of cargo from the ship, is it? A. No, in

142 effect we guarantee the payment of proper general average charges, conditioned upon their taking an average bond.

Q. What you guarantee is that the consignee or receiver of the cargo will pay the full amount of general average assessed against their cargo? A. Virtually that is the import and intent of it.

Q. In every instance here where you gave general average guarantees your company was obligated to pay the full amount of the contribution shown? A. In the last analysis, yes.

143 Q. Wasn't that your undertaking with the other party to the guaranty? A. I don't understand it that way; we guarantee payment of the general average charges; if fully insured, we pay the whole thing; if partially insured, we pay our share and allow the adjusters to go to the consignee and collect the balance.

Q. But where the adjusters are taking general average guaranties of your company, do they not look to your company in the first instance to perform those? A. They come to us in the first instance and formerly they came with an order from the consignee for us to pay.

144 Q. They look to you for the first payment of cash? A. As a matter of practice, yes.

Q. Under those guaranties you are liable for the full amount of the contribution? A. If they cannot—

Q. Does not the guaranty say— A. If you have it it will speak for itself.

Q. Does the guaranty say that or is it a 100 per cent. obligation on the part of your company? A. As nearly as I can remember the phraseology it says that upon taking the average bond from the

145

consignee—now we omit that at the request of the adjusters—but on taking an average bond we agree upon the payment—as I recall it—of the correct amount of general average charges.

Q. Your guarantee is simply a performance of the bond? A. We become surety for payment of the general average charges.

Q. You guarantee payment or the performance of the general average bond? A. Yes.

Q. The practice is to look to your company in the first instance for payment? A. As a matter of practice, yes, they come to us.

146

Q. Under that undertaking you are obligated to pay the full amount, aren't you? A. Yes, obligated to pay the full amount if they wish to enforce the suretyship, which they don't as a practice, when we pay short that is the last we hear of it.

Q. You simply refuse to pay the full amount of the obligation? A. We do not refuse to pay but we pay what we consider we are liable for.

Q. The differences are usually these small amounts? A. Large or small as the case may be.

Mr. Lyeth: May I point out to the court that they are not all small, there are several pretty substantial amounts in here, one $1428, one $2836, $1065, $1290.

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A. (Continued) Of course the individual losses of cargo aren't equal to the values of ships, they are frequently small, that is one of the reasons why this question wasn't raised sooner.

148 WILLIAM D. PHILLIPS, being duly sworn and examined as a witness for the respondent, testified as follows:

By Mr. Lyeth:

Q. Mr. Phillips, what is your business? A. Marine insurance.

Q. What company? A. Insurance Company of North America.

Q. What is your position now? A. Manager of the New York Loss Department.

149 Q. How long have you been in New York? A. Since 1917.

Q. Prior to that time where were you? A. Philadelphia.

Q. In what capacity there? A. I was assistant manager of the loss department in Philadelphia when I left.

Q. Do you know what the practice in Philadelphia was among underwriters with respect to the payment of general average contributions on cargo where the contributory value was in excess of the insured value?

150 Mr. Campbell: I object to the question on the same grounds as not the proper way to prove custom, it is indefinite with respect to the years.

Q. (Continued) Prior to 1917 when you left Philadelphia?

By the Commissioner:

Q. Was there any uniform custom to your knowledge? A. I could speak for a uniform custom of my company.

151

The Commissioner: Objection sustained, if that is all you can speak for.
Exception.

Q. Do you know what is the general practice among underwriters in Philadelphia?

Mr. Campbell: Objected to.

Q. Was there any general practice or custom? A. I am afraid I can only say what my own company did.

152

By Mr. Lyeth:

Q. What was the practice or custom of your company.

Mr. Campbell: I object to it as immaterial, incompetent and irrelevant.
Sustained.
Exception.

Q. What was the practice of your company with respect to settlements of general average contributions on the cargo where the contributory value was in excess of the insured value? A. For what period?

153

Mr. Campbell: And where?

Q. In Philadelphia first, prior to 1910?

Mr. Campbell: Please note that I reserve my objections.
The Commissioner: Yes, all of them.

A. We paid the full amount of the contribution and billed the assured for the excess—paid the ad-

154 justers in full, assuming of course there was no objection to the adjustment.

Q. And did you collect from the assured the difference? A. Well, I never heard them object, never heard any objections, never saw the checks come in, I imagine they went through.

Q. If there had been any objection, would you have known it? A. I would have, absolutely.

By the Commissioner:

155 Q. This was limited to prior to 1910? A. Yes sir, that is right.

Q. What was done after 1910 in Philadelphia in your company? A. Well, directly following 1910 we endeavored to get the money back from the assured in the same way but I imagine in two years, I guess 1912, we stopped that and paid the general average contribution in full without any recourse against the assured.

Cross-examination by Mr. Campbell:

156 Q. You wouldn't pretend to say that in cases prior to 1910 that the assured paid you the difference, would you, you simply don't know? A. No, I don't know that they objected, I would have known it I think—40 cents or something like that we probably wouldn't ask.

Decision reserved as to the objections.

Adjourned until Friday, March 18th, 1927 at 11.30 A. M.

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March 18th, 1927.

Met pursuant to adjournment.

Present as before.

GALLOWAY C. MORRIS, being duly sworn and examined as a witness for the respondent, testified as follows:

By Mr. Lyeth:

158 Q. Mr. Morris, what is your occupation? A. I am third vice-president, Insurance Company of North America.

Q. How long have you been in the insurance business? A. Since August, 1899.

Q. Were you employed by Johnson & Higgins at any time? A. Yes, sir, I was under the employ of Johnson & Higgins from August 7, 1899.

Q. Where? A. In Philadelphia.

Q. How long were you there? A. Until the end of March, 1909.

Q. And what were your duties and employment? A. At first in the marine brokerage department and later in the adjusting department. 159

Q. Did you collect average contributions under general average statements from the various underwriters in Philadelphia? A. I did.

Q. Did you also act in the brokerage department for underwriters? A. Yes, as respects such accounts as we had to handle as brokers.

Q. Do you know what the practice and the custom was with respect to the payment by underwriters of average contributions where the contributory value of the cargo was in excess of the insured value?

160 Mr. Campbell: I object to the question, not a proper one to prove the custom.

By the Commissioner:

Q. Was there any uniform practice to your knowledge in that respect? A. Yes, sir.

By Mr. Lyeth:

Q. What was the practice? A. The underwriters would pay the contribution due from the sum
161 insured and the merchant would pay the balance or the contribution due from the contributory value in excess of insured value. In some instances the checks of the merchants for their contribution would be tendered with the underwriter's check for the remainder and in other cases the underwriters in fulfillment of their guaranty paid the gross amount of contribution and collected the proportion due from the merchant, either later or took it into their account and drew their check for the gross amount, I have known it to be handled both ways, but the result is the same.

162 Q. Did you during that period do any work in New York for Johnson & Higgins? A. Temporarily for a matter of a week or two at a time.

Q. Do you know whether that custom and practice was followed in New York?

Mr. Campbell: I object to that if the court please, the witness has not been qualified as an expert in New York.

By the Commissioner:

Q. You say temporary periods—over what duration of time have you acted in New York? A. It

163

was only a matter of a few weeks occasionally that I would be over here.

Q. Over what period? A. From 1907 on to 1909, probably all told there weren't more than 8 or 10 weeks I should say.

By Mr. Campbell:

Q. Were you doing work in the office of Johnson & Higgins? A. Yes.

Q. What doing? A. Assisting in getting in collections, amounts due under average statements from the underwriters and merchants. 164

Q. In the adjusting department? A. In the adjusting department.

The Commissioner: He may answer. Exception.

By Mr. Lyeth:

Q. What was the practice and custom in New York?

Mr. Campbell: I object to that question, not the proper way to prove custom. 165

Q. (Continued) As far as you observed from your work in New York?

Mr. Campbell: Same objection.

The Commissioner: Of course it is a question whether his experience is sufficient to enable him to testify whether there was or was not a uniform custom. You may answer.

A. I think it was the custom to deal with it in New York in the same manner as in Philadelphia.

166 The Commissioner: It isnt what you think, if you don't know, Mr. Morris.

A. (Continued) It was the custom and I have personally seen entries on Johnson & Higgins collection books showing the amounts so received from the merchants and the balance of the contribution from the underwriters.

Cross Examination by Mr. Campbell:

167 Q. When you testified that there was a custom, you are saying it because you have seen entries to that effect on Johnson & Higgins books in some instances? A. Speaking with regard to New York or Philadelphia?

Q. New York. A. Partly that and partly from my experience from an underwriting standpoint, exclusive of the time I was in the employ of Johnson & Higgins.

Q. What do you mean exclusive of the time you were in the employ of Johnson & Higgins? A. Well, I have been in business 18 years since I left Johnson & Higgins.

168 Q. That is since 1910? A. Since 1909.

Q. But this question was prior to 1910? A. Yes and I have had occasion to go over the loss books of record which clearly indicate that that was the practice.

Q. What you are talking about now is that you have been shown a list of the Atlantic Mutual? A. I have been shown no list of the Atlantic Mutual.

Q. What loss accounts have you had occasion to go over that you refer to? A. General loss books of the Insurance Company of North America.

Q. In Philadelphia? A. And in New York.

169

Q. And your testimony about custom is confined to what you have learned in the practice of that company, isn't it? A. Not necessarily.

Q. Isn't it a fact? A. No.

Q. You don't know what the practice is of other companies? A. I have discussed matters of practice with them and how they dealt with matters, and believe that to be the uniform practice.

Q. I don't care what your belief is, we are talking about what is the fact—are you prepared to say to this Court that no underwriters in New York either prior to or subsequent to 1910 are 170
paying their assured on the basis of full indemnity under valued policies? A. I don't quite understand.

Q. Is the business carried on in this practical sort of a way—assuming that a ship comes into the port of New York with cargo on board and she is under a general average so that an adjustment must be made up, the probabilities are that the ship, freight and cargo will be called upon to contribute to the general average—now isn't it and hasn't it been for many years the practice for the adjusters to deliver the cargo against underwriters 171
on the cargo giving guarantees that they will pay any contribution levied against the cargo on general average? A. I don't think that your question as regards the form of the guaranty is quite correct.

Q. Tell me wherein it is wrong? A. My recollection is that the guaranty given reads that in consideration of the delivery from a named vessel of the following cargo consigned to whatever the name of the merchant might be, we guarantee the payment of any general average, salvage and/or special charges for which said goods may be liable

172 —that doesn't necessarily mean that they guarantee to pay the whole amount, they guarantee themselves that it will be paid.

Q. Accepting your statement that they guarantee that it will be paid—business is carried on that way, that when cargo is delivered such or similar guarantees are given, signed by the underwriters? A. Yes.

Q. And then the cargo passes to the hands of the consignees? A. Yes, the bond is also signed by the assured.

173 Q. The adjusters then prepare a general average statement? A. Yes.

Q. And after the statement is prepared, if the statement shows that there are contributions due from the cargo the adjusters or those who collect the general average will go to the underwriters and ask them to pay on their guarantees, do they not? A. Yes.

Q. Now the underwriters make a practice of paying in full, do they not? A. No, not necessarily.

Q. Isn't it the general practice for the underwriters to honor their guarantee 100 percent and
174 pay in full under them? A. Yes, they do honor their guarantees but that doesn't necessarily mean that they themselves pay the 100 percent in full.

Q. They pay the full contribution levied against the cargo? A. Not necessarily.

Q. As a rule? A. It would depend on the case, there are very few instances comparatively where the contributory value exceeds the insured value, those instances would not be involved.

Q. In those instances where the contributory value does exceed the insured value, has it been the general practice for the underwriters to pay the full amount of the contribution? A. No, sometimes

175

they would pay in full and collect the proportion due from the merchant representing the contribution from value in excess of the assured value—in other cases they would pay the proportion due from the insured value and the merchant would contribute his proportion with his own check.

Q. Then your statement is there is not settled practice whether they pay in full or do not pay in full? A. The underwriters did not pay the full contributions due in such instances.

Q. You mean your company or underwriters generally? A. Most of the underwriters did not.

176

Q. How do you know what most of them did? A. By contract.

Q. Did you discuss all these cases generally with all the underwriters in New York? A. No.

Q. How many underwriters were doing business in New York during that period—how many different companies? A. I can't say positively but approximately 35 to 40.

Q. Can you recall any instance of a discussion of that character with any particular underwriter during those years? A. The years 19—

Q. Prior to 1910? A. Prior to 1910, yes.

177

Q. What was the instance? A. I don't recollect any particular case, it was a question as to what the practice was.

Q. I am asking you can you recollect any particular case now in which you discussed that question with any underwriter in New York prior to 1910? A. The name of the vessel and so on?

Q. Yes. A. No, I couldn't recollect the exact case.

Q. Underwriters would attempt to—underwriters who had given general average guarantees would attempt to obtain from their assureds coun-

178 ter-guarantees by which the assured would obligate themselves to pay the excess of general average resulting from the increase of the contributory value over the insured value? A. Some companies did, I couldn't say as to all of them, some did because I have known in a brokerage capacity when I have applied for guarantees in order to obtain the release of goods it has been necessary to supply an underwriter with an excess contributory guarantee signed by their assured.

Q. That was always a controversy, was it not,
179 between brokers and underwriters in New York—that is to say as to whether the brokers would give these counter-guarantees and whether the underwriters would get them? A. No, I shouldn't call it a controversy, I should say discussions regarding that were the exception rather than the rule, there were a few cases and some brokerage houses questioned it and without admitting the situation one way or the other if there was any question about it the underwriters took the excess contributory guarantees as an extra safeguard.

Q. When did you enter the employ of Johnson
180 & Higgins? A. August 7, 1899.

Q. And when did you leave the employ? A. I think the 27th of March, 1909.

Q. And during all that time you were stationed in their Philadelphia office? A. Chiefly that was my station.

Q. You were attached to the Philadelphia office? A. Yes and occasionally asked to come to New York.

Q. How many times a year during those intervening years did you come to New York to work? A. There was no set period.

Q. You have some notion I take it? A. Yes, I know.

181

Q. Tell me what the fact is? A. Mr. Davey asked me to come to New York to help them out in their collection department, several of their men had left them, they were back in their work—

Q. I don't care about the reason—Mr. Davey of the adjusting department of Johnson & Higgins? A. Yes, the manager of the adjusting department.

Q. How many times during those intervening years that you were in the Philadelphia office were you brought to New York to work for Johnson & Higgins here? A. I couldn't say definitely but the best of my recollection three times.

182

Q. A year? A. No, during the period from 1906 to 1909.

Q. From 1906 to 1909 your recollection is you probably came over three times? A. Yes.

Q. How long would you stay on each occasion? A. From three or four days to three or four weeks.

Q. I don't want guessing, I want the Court to have the benefit of some fairly accurate statement as to the time of your experience in New York, have you any recollection? A. I have so stated.

Q. Can't you recall better than that as to whether three or four days or three or four weeks? A. On some occasions two or three days only, something would turn up requiring my presence in Philadelphia and I would have to go back, other times I would be here three or four weeks at a time.

183

Q. From 1899 to 1907 you said you were brought here three times? A. I didn't say that.

Q. That is what I understood you to say? A. You are quite mistaken, I said from 1906.

Q. I beg your pardon—can't you tell in that short period of time as to whether your time in New York was three or four days or three or four weeks on each of those three occasions? A. No,

184 that is from 16 to 20 years ago, I don't quite remember what I did every day.

Q. Don't you know as a mater of fact that Johnson & Higgins always refused to give counter-guarantees which would obligate the assureds under valued policies to contribute to the excess of general average in those instances where the contributory values were higher than the insured value in policies?

Mr. Lyeth: I object to the question as
185 going beyond any—

The Commissioner: It is cross-examination, he may answer.

A. No, that was not borne out by the facts because they did furnish those guarantees in some instances to my personal knowledge in order to obtain the—

Q. In some instances? A. Yes.

Q. But in the majority of instances they refused, didn't they? A. No, not to my knowledge.

Q. Have you any knowledge? A. Whenever they asked they were given.

186 Q. You say that the cases—the instances in which contributory values were higher than insured values were very rare, is that what you said, or words to that effect? A. Yes, in proportion to the total they are the exception rather than the rule.

Q. Granting that, how many cases of that character came to your attention in the three visits to New York which you made between 1906 and 1909? A. I couldn't state accurately.

Q. You cannot recall any now? A. I can remember seeing entries to that effect in the loss book.

187

Q. In Johnson & Higgins' book? A. Yes.

Q. Can you picture now the page? A. Fairly accurately.

Q. Where you saw that? A. Yes.

Q. All these years you can retain a mental pi. ture of a page in which an entry of that sort r· mained? A. I am fairly familiar with it.

Q. You are under oath, that is not what I am asking you, can you retain a mental picture of it? A. Yes.

Q. In Johnson & Higgins' book? A. Yes.

Q. Do you have any recollection of this company 188
ever being called upon to deal in a single instance during those three visits in New York with a case wherein the contributory values of the cargo were higher than the insured values? A. No, but I have seen the entries of those collections made on those books, my recollection is it is in the handwriting of Mr. Andrew Lange or Lawrence Gourlie.

Q. Have you any recollection as to what the other entries show? A. Yes, the collection book would be entered up from the adjustment by the companies from whom—who insured these various merchants, below would be the names of the mer- 189
chants, and opposite the amount due from those shipments, then there would be a marginal column for remarks and notations as to when remittances were received—when the collections came in.

Q. Would they be collections from consignees of cargo of the excess of the amount of the general average due to the increase of contributory value over insured value? A. Yes, in some instances, I believe in all instances where that occured, but as I said before those were the exception rather than the rule, taking collections by and large.

Q. Why did you go through these books, did you

190 go through to examine all of these cases over all of the thousands of collections Johnson & Higgins were making during those years, did you go through to examine on the basis they were made? A. Not for all the years I was dealing with collections, I have in mind at the time I happened to be there.

Q. It was only that portion of the books you were examining? A. Exactly.

Q. And yet you say the instances in which contributory value was higher than insured value are
191 rare? A. Yes.

Q. Can you recall any case during those three visits which you had to deal with where that situation existed? A. No, but I saw entries as respects some of them on the books at the time.

Q. But they were not cases that you had to deal with? A. Not personally.

Q. Who dealt with them, Mr. Davey? A. Mr. Davey was the manager of the adjusting department.

Q. He was familiar with all the business that was going on, wasn't he? A. Unquestionably so.

192 Q. Now is the Insurance Company of North America a re-insurer of the Atlantic Mutual Insurance Company on this loss? A. Not to the best of my knowledge, information or belief.

The Commissioner: That doesn't help very much, have you any knowledge on the subject?

The Witness: No, I have not, I am quite sure that we have no interest in the loss from a cargo standpoint, we may have a hull line but I could verify that in the office very readily.

193

Q. In Philadelphia since 1910 there has been a varied practice, has there not, with respect to underwriters indemnifying their assureds in those instances where the contributory values of cargo are higher than the insured values in cases of general average? A. I don't recollect any cases of underwriters directly indemnifying their assured during that period.

Q. You know of no case since 1910 in which the underwriters have been called upon to indemnify their assureds under valued policies on cargo where the assureds have been called upon to make contributions to general average assessed against the cargoes on the basis of contributory values in excess of the insured values? A. It would not be customary to indemnify the assured direct, they would make payments to the adjusters.

194

Q. (Repeated) You know of no case since 1910 in which the underwriters have been called upon to indemnify their assureds under valued policies on cargo where the assureds have been called upon to make contributions to general average assessed against the cargoes on the basis of contributory values in excess of the insured values?

195

Mr. Lyeth: I object to the question because I don't understand it.

The Commissioner: The question is whether the witness understands it, can you answer?

The Witness: It is not altogether clear.

Mr. Campbell: I will try and frame it in such a way that it is intelligible, it is rather technical.

Q. Do you know of any cases in Philadelphia since 1910 in which the underwriters on valued

196 policies on cargo have been called upon to pay their assureds general average contributions levied against the cargo on the basis of contributory values which were higher than the insured values—is that intelligible? A. I don't know of any case where the underwriters have paid their assured general average contributions during that period of time.

Q. By that you mean that the practice has been for the underwriters to pay under their guarantees instead of paying the assureds? A. Yes.

197 Q. And the underwriters have made the practice of paying the full contributions assessed against the cargo on which they give guarantees? A. Since 1910—yes.

Q. And the underwriters in those instances where the contributory value has been higher than the insured value have then attempted in some instances to collect the excess from the assured? A. Yes.

Q. In some cases you succeed, in some cases you fail? A. I don't recollect of ever failing if it was ever attempted, I don't recollect the refusal of any demand.

198 Q. You don't attempt to collect it in all cases? A. No, frequently where it is a matter of a few cents, a dollar or so the cost would be more than the amount involved.

Q. In some cases you attempt to collect it, in some cases you don't attempt to collect it? A. Where it is a substantial amount we charge it.

Q. How many cases of that sort have arisen since 1910 to your personal knowledge?

Mr. Lyeth: Do you mean up to the present time or up to 1915—I object to the question as applying beyond 1915 as immaterial.

199

Q. Between 1910 and 1915 how many cases? A. I couldn't state with any accuracy.

Q. They are very rare, aren't they? A. As I said previously, I said they only arise occasionally, they are the exception rather than the rule.

Q. When you were over here in New York for Johnson & Higgins just specifically what did you do on those three occasions? A. I assisted Mr. Lange in collecting amounts due from underwriters under average statements both P/A and G/A.

Q. Did you ever undertake to obtain from the consignees on cargo, counter-guarantees requested 200
by the underwriters? A. No, when I was in New York, I had nothing whatever to do with taking security from cargo in order to obtain its release.

Re-direct Examination by Mr. Lyeth:

Q. When you were in Philadelphia did you collect any so-called counter-guarantees from the assured covering excess contributory value over insured value? A. Yes.

Q. Did you do that right along during the period from 1899 to 1909?

201

Mr. Campbell: I object to the question, this man is attempting to prove custom, that is not the proper way to prove it.

The Commissioner: He may answer.

Exception.

A. Yes, it was the custom, some merchants gave a permanent guaranty which was on file and would be applicable to any merchandise on whatever vessel it happened to move by—others would issue specific ones as applied to the particular goods on the boat in question.

202 Q. And did you obtain those while you were employed by Johnson & Higgins?

Mr. Campbell: Same objection.

A. I did.

Q. I understood you to say in answer to Mr. Campbell's question that after 1919 if the amounts of excess general average contributions due to excess contributory value were trivial that you did not collect them from the merchants—did you collect them when they were substantial? A. Yes, we did and the only reason that the smaller amounts were not collected was it wasn't worth the money.

203

Mr. Campbell: I move to strike out the reasons, the fact we are interested in is that you did not collect them.

The Commissioner: I will let it stand.

PERCY G. CRAIG recalled:

204 By Mr. Lyeth:

Q. Have you examined the books of the Atlantic Mutual for cases of payment of general average contributions between 1910 and 1915? A. Yes.

Q. Have you prepared a list of cases in which payments during that period were made of only the proportion of the general average contribution which the insured value bore to the contributory value? A. Yes, I have it here.

Q. Did you find any other cases where the contributory value was in excess of the insured value than these? A. Yes, I found others.

205

Q. Was there any short payment in those cases? A. No.

Q. What were the amounts of the differences, approximately? A. In all those cases they were trivial.

Q. What do you mean by trivial? A. Oh, they might have been 50 cents, $1.50, $5.00, $7.00 or $8.00.

Q. Whether or not this list contains all of the cases where the difference was in excess of $5.00 or $10.00? A. To the best of my recollection it does.

206

Mr. Lyeth: I offer this list in evidence.

By Mr. Campbell:

Q. You say these were the only cases that you found on the Atlantic Mutual's books between 1910 and 1915? A. During that period, yes, where short payment was made.

Q. Where short payment was made? A. Yes.

Q. There are many cases on your books in which you made full payment, are there not? A. Yes.

Q. So there was no fixed practice during that period as to whether you paid in full or whether you did not? A. In many cases—there were many cases where there was no contributory value, of course I examined some five or six books and they contain a great many cases, these are all that I found.

207

Q. In which you had made deductions? A. Yes, the majority of them there was no excessive contributory values.

Q. While no excessive contributory values, there were many cases where you paid in full? A. Yes, small amounts involved.

208 Q. So that you had no fixed practice in your office as to whether you paid in full or did not pay in full? A. Yes, we had a fixed practice that where the amount was trivial we would not trouble anyone but where it was of importance we would short pay.

Q. In these cases what would you do, refuse to pay? A. Simply draw a check for the amount we considered due.

Q. The check would be paid to the adjuster? A. Yes, paid to the adjusters.

209 Q. In performance of your general average guaranty? A. Paid to the adjusters because we had given guarantees and they accepted it.

Q. They were paid under your guaranties? A. Under our guaranties, yes.

Q. And your attitude was to the adjusters, take it or leave it, they could accept it or not? A. And they took it.

Q. And the amounts were small, $26, $114, $48, $55, $35 and $18—six cases from 1911 to 1915—how many cases were there where you did pay the full amount? A. You mean where the contributory value was in excess?

210 Q. Yes, they are the only cases we are dealing with in this controversy? A. There might have been 25, 30 or 40.

Q. 25, 30 or 40 where you paid the full amount of the contribution? A. We paid the full amount in trivial cases.

Q. And did not seek to recover from the assured the excess due from the increase of contributory value over insured value? A. Yes, trivial cases.

Mr. Campbell: I object to the introduction of the record as being incomplete and

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on the further ground that it does not prove custom, it proves the portion of the practice of one office.

The Commissoner: You may mark it for identification subject to the objection.

The list is marked Respondent's Exhibit D for Identification.

By Mr. Lyeth:

Q. Was there any limit fixed in your office below which you would not trouble to pay short?

212

Mr. Campbell: I object to that if the court please.

The Commissioner: It is going pretty far afield, he has stated in general terms already, I don't know that it clarifies the situation at all, if he fixes the definite amount of $7.50 or what.

Mr. Lyeth: All I want is a definition of trivial.

The Commissioner: I think you asked that question.

213

Q. The cases which you refer to during the period in answer to Mr. Campbell's question—was the difference in each case or was it not trivial?

Mr. Campbell: Objected to as calling for an opinion of this witness.

The Commissioner: I don't believe you can go at it that way.

Q. Have you included in this list respondent's Exhibit "D" for identification all the cases where the contributory value was in excess of the insured

214 value and where the difference between the average contribution and the amount paid was more than $10.00? A. That is only included in this list, those cases where we short paid.

Q. Were there any cases where the contributory value was in excess of the insured value in which you paid in full where the difference between the amount paid and the average contribution was more than $10.00? A. I can't answer that exactly from memory, the majority—that vast majority of them would be under $10.00.

215 By Mr. Campbell:

Q. This list was made for the purpose of setting forth those cases in which you short paid? A. Yes, where we paid only the amount applicable to the insured value.

Q. On what basis? A. In one case you will notice we paid in full and collected from our assured, accomplished the same result.

Q. That was under a counter-guaranty? A. I can't say, I haven't the loss documents before me.

Q. Speaking generally, this is a list in which you
216 over a period of five years, 1910 to 1915—a list of the cases which the Atlantic Mutual short paid? A. Yes.

Q. Or in one instance collected the excess from the insured? A. Paid only the amount applicable to the policy valuation.

Q. You have made no attempt to go through your books and make up a list where you paid in full? A. I prepared no list, I examined every page of the records.

Q. As I recall you said that might amount to 25 or 30 cases of that character for the same period? A. Approximately, yes.

217

CORNELIUS ELDERT, Re Recalled:

By Mr. Lyeth:

Q. Mr. Eldert, will you state what the custom is in New York with respect to payments of general average contributions where the contributory value is in excess of the insured value after the date when the Maldonado decision came down in 1910?

Mr. Campbell: I object to it, not a proper question.

The Commissioner: We have already 218
covered it.

Mr. Campbell: It is not a proper question to prove custom, you can't prove it in that way.

Mr. Lyeth: I limited my questions yesterday prior to 1910. The purpose of this testimony was to show what the lot in New York was.

The Commissioner: I asked whether there was any practice subsequent to 1910.

Mr. Campbell: Not only was it asked but he himself stated and counsel stated that 219
there was no practice after 1910, he stated emphatically, that all came out at the time when we were questioning the admissibility of evidence with respect to the period prior to 1910.

Mr. Lyeth: I didn't make any positive statement as to the practice subsequent to 1910, I said I didn't think it was material.

Mr. Campbell: My recollection was that you very clearly stated there was no fixed practice subsequent to 1910, I think Mr.

220 Eldert himself was asked that question and testified to that.

By the Commissioner:

Q. Don't you recollect that, Mr. Eldert? A. I think I may have testified that way, I certainly shall if I am allowed to answer the question now.

Q. Do you want to change your testimony? A. No, I don't remember the language I used yesterday but I remember what is in my mind, I would say now it is a confused practice—the Maldonado
221 case was a disorganizing element.

The Commissioner: That is what you said.

By Mr. Lyeth:

Q. Did you or didn't your company continue the practice of paying short and collecting from the assured?

Mr. Campbell: I object to that.

222 The Commissioner: He has stated that his practice was uniform after 1910, that of course would throw no light on the custom but it is the fact as he has stated in his testimony. Let him answer.

A. We have just submitted a record to show that we did collect and Mr. Craig has testified that there were other cases where we did not collect, in nearly all the cases they were trivial where it did not seem worth while to pursue the matter, I have no knowledge to the contrary because I did not deal directly with payments in those cases.

223

By Mr. Campbell:

Q. All you know is what the books show? A. What the books show—I do know that the principle involved was that in our mind and was never given up, we were simply waiting a case of this kind to bring it, I say this is the first one that has offered.

Mr. Campbell: I move to strike that out as immaterial.

By Mr. Lyeth:

224

Q. Was this the first case that was presented where the amount was sufficient to make a legal proceeding possible? A. It is.

WILLIAM N. DAVEY, being duly sworn and examined as a witness for the libellant, testified as follows:

By Mr. Campbell:

225

Q. Of what firm are you a member or officer? A. Johnson & Higgins.

Q. What is its business? A. Average adjusters and insurance brokers.

Q. How long have you been in the service of Johnson & Higgins? A. Since January, 1896.

Q. Have you ever been in the service of any other average adjusting or marine insurance brokerage concern? A. No.

Q. What is your present position with that concern? A. I am director, vice president of Johnson & Higgins in charge of the adjusting department, senior adjusting director.

226 Q. What position did you occupy with that firm during the period 1906-1909? A. Manager of the adjusting department.

Q. I speak of it as a firm; as a matter of fact it is a corporation? A. A corporation since 1899.

Q. As such manager what were your duties? A. Why, subject to the director then in charge of the adjusting department, I was in full charge of the adjusting department.

Q. What character of work was carried on by the department? A. Adjusting averages and at-
227 tending to claims under policies of insurance affected by Johnson & Higgins as brokers.

Q. Did you have anything to do with taking general average securities? A. Yes, that is part of the business of average adjusting.

Q. Now, is there any change in the duties of your present office from what they were in 1906-1909? A. Change in the duties in my present office?

Q. Yes. A. Except that I am director now, responsible for that part of the business and have other responsibilities incidental to being a director; why, there is no change in my position as
228 director of the department and as manager of the department.

Q. Are you familiar with the practice that has prevailed in New York since the time that you went with Johnson & Higgins and particularly from the years prior to 1910 with respect to the taking of securities and with respect to the giving of guaranties in cases of general average? A. Yes.

Q. Assume the case of a vessel coming into the port of New York having suffered losses or incurred expenditures of a general average character, will you state for the benefit of the court just what the practice has been and is with respect to the giving of guarantees and delivery of cargo?

229

Mr. Lyeth: I object to the question on the ground that the witness has not been qualified to show his experience with respect to the obtaining of guarantees.

Mr. Campbell: I will ask him that question.

Q. What, if any, experience have you had in the port of New York since your connection with Johnson & Higgins in respect to the procuring of general average guarantees? A. It has been part of my duties to obtain such guarantees or oversee the obtaining of such guarantees depending on the position I occupied during that period, ever since I have been with Johnson & Higgins. 230

Q. Have you or not been familiar with the prevailing practice with respect to it? A. Thoroughly familiar.

Q. I renew my question. (Repeated.) Assume the case of a vessel coming into the port of New York having suffered losses or incurred expenditures of a general average character, will you state for the benefit of the court just what the practice has been and is with respect to the giving of guarantees and delivery of cargo? 231

Mr. Lyeth: The further objection that he has not been qualified to know what the practice is outside of Johnson & Higgins. He can say what it is with respect to Johnson & Higgins.

Mr. Campbell: I am not asking the question to prove custom. I am trying to bet before the court a preliminary question: the actual method in which business is carried on.

232 Q. Do you know whether or not there is a fixed practice in New York with respect to the taking and giving of general average guarantees covering liability of cargo or general average contributions where ships laden with cargo have become subject to general average losses and expenditures? A. Yes.

Q. Have you personally had anything to do with the taking and giving of these guarantees under such conditions? A. Yes, I answered that question before.

233 Q. Will you state what the practice is and what it has been since you have been connected with Johnson & Higgins? A. Well, general average guarantees—

Mr. Lyeth: Is this the practice of Johnson & Higgins?

Mr. Campbell: No, my question is general; he said there was a practice. I am asking what it is.

Mr. Lyeth: I object to it if it goes beyond the practice of Johnson & Higgins.

Overruled.

234 Exception.

A. (Continued.) It has been the practice in the port of New York to accept general average guarantees from insurance companies doing business here in good standing, bankers and others whose security is satisfactory, in all instances in lieu of a cash deposit.

Q. What do these guarantees provide for?

Mr. Lyeth: I object to the question as calling for the contents of written documents.

235

Mr. Campbell: Talking generally about guarantees which are given in accordance with the practice in New York on which cargo under liability for contribution to general average is delivered to the consignees.

Q. Is there any standard form of such guaranty in common use in New York? A. There is.

Q. Can you produce copy of the form? A. I cannot at the moment but I shall be glad to.

Mr. Campbell: We will produce that later if it is necessary. 236

Q. Can you state the contents, in substance, of such guarantees commonly used?

Mr. Lyeth: That is with the understanding you will produce the form.

A. The guaranty is addressed to the adjusters or steamship owners or agents and, as near as I can remember, the wording of it says that in consideration of the delivery of certain named goods and named vessel without the requirement of a general average deposit, the undersigned guarantee the payment of all general average, salvage and special charges for which such goods shall be liable. 237

Q. Now do you know whether or not there was in the port of New York prior to 1910 any fixed custom by which underwriters who executed and delivered to adjusters, trustees or ship owners general average guarantees covering the liability of cargo to contribute to general averages, obtained from their assureds under valued policies on such cargoes, counter-guarantees by which such assureds

238 would agree to pay the excess contribution, if any, which might be imposed upon such cargo because of its contributory value being higher than the value stated in the policies?

Mr. Lyeth: Objected to as immaterial and irrelevant.

The Commissioners: By "fixed" you mean "uniform?"

Mr. Campbell: Uniform.

Objection overruled.

239 Exception.

The Commissioner: He may answer.

A. I do know there was no such fixed custom or any fixed custom.

Q. I repeat the same question, confine it to the period from 1910 to 1915? A. I answer in the same way.

Q. I repeat the same question for the period of 1915 to the present date.

Mr. Lyeth: I object on the further ground that it is immaterial, after 1915.

240 The Commissioner: When was this adjustment made?

Mr. Campbell: 1916.

Q. I will confine my question to through 1916. A. I answer in the same way.

Q. You heard the testimony, did you not, that was given by Mr. Morris this morning? A. I heard it.

Q. His testimony was in effect that Johnson & Higgins during the years 1906 and 1909 in New York accepted short payments of general average contributions due from cargo in cases where the

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contributory value of the cargo was higher than the value fixed in the policies, I ask you whether or not that testimony of Mr. Morris was correct? A. That testimony was not correct, it was misleading.

Q. Was there in New York prior to 1915 any fixed custom by which underwriters on valued policies on cargo settled with their assureds for general average contributions levied against such cargo and paid by such underwriters under general average guarantees on the basis of the underwriters bearing only such proportion of the contribu- 242
tion as the amount of the insurance bore to the contributory value of the cargo?

Mr. Lyeth: I object to that on the ground that the witness has not been shown to be qualified as to what the practice of underwriters was with respect to settlements with their assureds.

Q. Did Johnson & Higgins in the course of its business represent assureds in the collection of losses and claims from underwriters? A. Yes.

Q. As manager of the adjusting department of 243
Johnson & Higgins did you have any knowledge of such business? A. I did.

Q. Have you now any knowledge as to what was the general practice in New York prior to 1915 with respect to such collections? A. You are speaking of collecting claims for general average where the general average was assessed on the contributory value in excess of the insured value?

Q. Yes.

By Mr. Lyeth:

Q. Mr. Davey, you were not in the brokerage de-

244 partment of Johnson & Higgins, were you? A. I was not in the brokerage department.

Q. It wasn't part of your duties to place insurance or to come into direct contact between the assured and underwriters? A. Well, the first part of your question I must answer that I did not place insurance; but the second part of your question I must answer that I did come into contact with the assured and the underwriter in relation to the business which Johnson & Higgins as brokers placed.

Q. What experience did you have with respect
245 to settlement of or collection of general average contributions beyond the collection of them from underwriters? A. I am sorry I don't understand the question.

Q. Well, did you have any other duties in the adjusting department with respect to the collection of average contributions other than to collect them from the underwriters—in other words beyond the brokerage department cases where Johnson & Higgins were brokers, did you have any dealings between underwriters and their assured with respect to general average contributions or the ap-
246 portionment of them? A. Well, if I understand your question you have asked me if in cases where Johnson & Higgins were brokers and one of their clients had a claim for general average charges against their underwriters, did I have anything to do with the collection of that claim, is that right?

Q. No, I asked you in cases where you were not brokers? A. Where we were not?

Q. Yes. A. In such cases the only collection I ever made were under general average guarantees.

Mr. Lyeth: I renew my objection to the question on the ground first that the witness

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has not been shown to be qualified as to the general custom other than the practice of Johnson & Higgins and furthermore than he has no knowledge or experience as to the apportionment of general average contributions between underwriters and assured except in cases where Johnson & Higgins were brokers.

The Commissioner: I think something might be said on both sides for the examination as far as it goes.

248

By Mr. Campbell:

Q. How extensive is the business of Johnson & Higgins and has it been during the years you have been engaged in the business? A. Johnson & Higgins have done a very large business, the organization is the oldest insurance brokerage and average adjusting office in the United States.

Q. With what underwriters have you done business—have Johnson & Higgins done business to your knowledge since you have been connected with them? A. Underwriters all over the world.

249

Q. In New York? A. Every underwriter in New York.

Q. As general average adjusters in the making up of these adjustments, fixing the liabilities of cargo contributions in general average and in collecting such contributions, do you deal with cargo owners whose insurance is placed by other brokers than Johnson & Higgins? A. Yes.

By Mr. Lyeth:

Q. In what way? A. Well, in the case of general average we deal with every—assuming the ves-

250 sel is coming to New York—we must deal with every consignee of cargo on board.

Q. Do you deal with them beyond obtaining an average bond from the consignee? A. Yes.

Q. What else do you do? A. Obtain statements of values of their cargo, depending on the case, we may have to invite every claim for a consideration for allowance in general average, up to a comparatively recent period we would after the general average statement is completed obtain a payment order requesting their underwriters to pay to us
251 the general average charges due from them.

By Mr. Campbell:

Q. Due from the cargo? A. Due from the cargo, if they were not insured in New York our dealings with them would be a little more extensive.

Q. Did you obtain payments under general average guarantees given by underwriters on cargo irrespective of who the brokers may be that had placed the insurance? A. Certainly.

Q. I repeat my question—do you know whether there was in New York in 1915 and prior thereto
252 any general custom by which underwriters on valued policies on cargo settled with their assureds for general average contributions levied against such cargo and paid by such underwriters under general average guarantees on the basis of the underwriters bearing only such proportion of the contribution as the amount of insurance bore to the contributory value of the cargo?

Mr. Lyeth: I renew my objection, it seems perfectly apparent that the witness on his own statment is not qualified to testify with

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respect to such custom, his only dealings with the merchant have to do with the making up of the general average statement itself, obtaining the values, the average bond and as he calls it the payment order on the underwriter. He has had no experience that he has testified to of any extent with respect to the dealings between the underwriter and the assured, that was only taken care of in the brokerage department and he isn't qualified to testify on such a question.

Mr. Campbell: I will meet one objection by asking this question— 254

Q. Has the brokerage department of Johnson & Higgins anything to do other than with the placing of insurance? A. Prior to about 1921 no, because collections of claims under such insurances were attended to by the adjusting department. Since about 1921, I don't remember the exact date, the brokerage department has attended to the collection of such claims.

Q. Since 1921? A. Yes.

Mr. Campbell: I submit that here is the most versatile man in New York in this line, he has qualified himself as an average adjuster, as the head of the adjusting department which has to do not only with the adjustment but with collections of insurances on policies of the oldest and largest brokerage house in New York, I cannot conceive of anyone having higher qualifications to answer this question. 255

The Commissioner: The whole point of the objection as I understand it is this:

256

By the Commissioner:

Q. Do your duties as head of the adjusting department of Johnson & Higgins enable you to know the attitude or the practice of underwriters in the regard specified in the question and if so will you explain how you come in contact with them in your work, I think that would clear up the whole thing? A. Yes, sir.

Q. Show how you are enabled in your duties to know the attitude of the underwriters with regard
257 to the point mentioned in the question? A. May I have the question again?

Q. He is objecting to the question, in other words, does the performance of your duty as the head of this adjusting department—how does it enable you to know the attitude of the underwriters with regard to the settlement of claims in the case mentioned in the question? A. My whole business has been devoted to dealing with claims either in particular average on policies, total losses under policies or in general average, incidental thereto I have been in constant communication and confer-
258 ences with merchants, underwriters, steamship owners and everyone connected with the marine business or importing—not everyone but—the exporting, importing and shipping business generally.

Q. Have you finished? A. Yes, sir.

By Mr. Lyeth:

Q. Then do I understand that your only source of knowledge of a custom existing between underwriters and their assureds with respect to cases where the contributory value is in excess of the insured value is conversations that you had with un-

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derwriters and merchants? A. No, it is not limited to that, it is actual experience, actually dealing with this kind of questions.

Q. How have you had as a matter of fact dealings with the question of what proportion of a general average contribution should be borne by the underwriter and what proportion should be borne by the merchant? A. I am having daily experience in that.

Q. How? A. In this way, as an average adjuster I am collecting general average guarantees, when the general average statement is completed I 260
am collecting under those guarantees, those guarantees are collected when vessels are bound to this country, they are collected when vessels are bound to South America, Mexico, the West Indies, the Far East and elsewhere, in the cases where the adjustment is made in this country. After the adjustment is completed I am collecting under those general average guarantees. The position of Johnson & Higgins is and has been to my knowledge for 31 years to say that the underwriter owes in full under the terms of a valued policy and to insist on a complete and full settlement. In the great, great ma- 261
jority of cases the collection is made in full, in some cases underwriters have said no we won't, our contributory value is in excess of our insured value.

Q. Just a moment, Mr. Davey, your experience does not go beyond the collection from somebody under the general average guaranty or general average bond? A. It does, I have answered the question before.

Q. How do you have anything to do as an average adjuster between the relations or dealings or adjustment of the proportion of the contribution between the underwriters and the assured?

262 Mr. Campbell: He is head of the collecting department of Johnson & Higgins.

Q. (Continued) I say beyond the collection of the average adjustment under your guaranty? A. Well, I have testified that up until 1921 all collections under cargo policies effected by Johnson & Higgins were made under my supervision.

Q. Collections under cargo policies? A. Yes—in other words collections from underwriters of general averages, particular averages and total losses.

263 Q. That is aside from general average? A. The claim under a policy and not the claim under their guaranty.

Q. That is aside from disasters involving general average? A. No, I have said general, particular average and total losses, when I saw those three things I believe I have covered all losses that happen under marine insurance policies, if not I make that statement.

Mr. Lyeth: We are confined only to general average cases here.

264 Q. How can you say, Mr. Davey, from your personal knowledge what the arrangements are or the custom is between underwriters and their assured with respect to general average contributions, beyond what experience you may have in the brokerage department? A. Beyond what experience I may have in the brokerage department?

Q. Or what duties you may have performed in the brokerage department? A. Well, I know perfectly well that in cases where the guaranty is accepted in this country and the vessel is outward bound the adjustment is completed here, the col-

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lection in full is made from the underwriters and that there is no possibility of underwriters being able to collect from the signers of the average agreement.

Q. Is that your personal knowledge? A. I consider that my knowledge after my experience in the business for 31 years.

Q. And you base your knowledge of the custom on the cases where the average contribution has been collected from underwriters where you believe that the underwriter could not collect any part of it from the assured, is that right? A. No, I have 266 not so testified.

Q. That is as I understood you? A. I have had a great many questions asked and I have tried to answer.

Q. Beyond the case that you have put, what further personal knowledge have you as to the practice or custom between the underwriters and their assured? A. In cases where we are brokers, the business with the underwriter and all the business is done through us.

Q. Where you are brokers? A. Where we are brokers, that has involved my collecting claims 267 from underwriters—witness the case of the Gulf Light—and we have had many such cases and I can say that—does that answer the question?

Q. Then your personal knowledge and experience is limited to cases where Johnson & Higgins have been brokers, I am speaking of your own personal knowledge and experience? A. Not so limited I testified otherwise, I believe.

Q. What other means have you?

The Commissioner: The other case is where you are adjusters?

The Witness: Yes, where we are adjusters.

268 Q. What personal knowledge of the settlements between the underwriters and their assured, of what proportion one should bear of the general average contribution and what proportion the other should bear have you had in general average cases where you were not brokers? A. I couldn't have any as an underwriter because I have not been an underwriter.

By the Commissioner:

269 Q. Well, as an adjuster would you or would you not in preparing an adjustment ascertain all these facts as to underwriter? A. Well, in preparing an adjustment we would not have before us all the information we would have as an insurance broker, as an adjuster one of the questions which the shipper or consignee is always requested to answer in furnishing the value of the goods is to furnish the insured value—we ask the underwriters to pay in full under their guarantees.

Q. If they do not pay in full they give you the reason why they do not? A. In a great many cases they do not, some occasionally say here, the con-
270 tributory value is in excess of the insured value and you should collect from the assured, the signer of the bonds—we take the position that—

Mr. Lyeth: I submit that what position they take—

The Commissioner: Let him answer the question.

A. (Continued) The underwriter owes in full and insist on a full settlement for the amount we offer, if the underwriters do not pay in full we bill their assured, but we will not follow it up, and in

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cases where Johnson & Higgins are brokers we won't even do that.

Mr. Lyeth: I move to strike out the answer as not responsive, expressing their position.

The Commissioner: The answer will stand.

Exception.

By Mr. Campbell:

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Q. In collecting from underwriters in the method you have heretofore described, with what underwriters in New York have you done business in making such collections? A. I have done business with every marine underwriter in New York in one way or another.

By Mr. Lyeth:

Q. But I am limiting my question now to cases in which you are an adjuster only and not a broker—beyond the connection which you may have with the underwriters and in which you say that 273 the underwriter either pays in full or asks you to collect from the assured, you have no personal knowledge of the relations or agreements or the practice between the underwriters and their assured, have you? A. I have no personal relations between the two?

Q. Yes. A. No, I have not.

Mr. Lyeth: I submit that the witness is not qualified to testify as to the custom between underwriters and assured.

Overruled.

274

By Mr. Campbell:

Q. (Repeated) Do you know whether there was in New York in 1915 and prior thereto any general custom by which underwriters on valued policies on cargo settled with their assureds for general average contributions levied against such cargo and paid by such underwriters on general average guaranties on the basis of the underwriters bearing only such proportion of the contribution as the amount of insurance bore to the contributory
275 value of the cargo? A. Do I know whether there was such a custom or not?

The Commissioner: Yes.

A. Yes.

Q. Was there or was there not such a custom? A. There was no fixed custom or practice.

By the Commissioner:

Q. By that I understand you to mean that the actual practice varied? A. Yes, sir.

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Adjourned for luncheon until 2:30 P. M.

WILLIAM N. DAVEY resumes the stand.

Direct Examination continued by Mr. Campbell:

Q. What can you say as to whether Johnson & Higgins made a practice prior to the year of 1916 while you were in their service of obtaining from the cargo owners for whom they acted as brokers,

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counter-guarantees and giving them to the underwriters on cargo whereby the cargo owner agreed to pay any excess general average contribution assessed against the cargo and resulting from the contributory value of the cargo being higher than the value stipulated in the policy?

Mr. Lyeth: Objected to as immaterial, and irrelevant.

The Commissioner: He may answer.

Exception.

278

A. Johnson & Higgins' practice has always been to decline to ask their clients for any such guaranties.

Q. In those cases where underwriters on cargo under valued policies paid the full general average contribution assessed against such cargo because such underwriters had given general average guaranties and where there was an excess general average contribution resulting from the fact that the contributory value of the cargo was higher than the value stipulated in the policies on the cargo—I say in those cases would Johnson & Higgins during the year 1916 and prior thereto pay on behalf of the cargo owner to underwriters such excess general average contribution?

279

Mr. Lyeth: Objected to as immaterial, incompetent, not establishing a custom.

The Commissioner: Of course it does not bear on the custom, the witness testified there wasn't any. He may answer.

A. No, because Johnson & Higgins would not attempt to make any such collections from their clients.

280 Q. If Johnson & Higgins were asked by underwriters to collect from their clients such excess general average contribution liabilities, would they attempt to do so? A. No.

Mr. Lyeth: I object to that.

The Commissioner: He said they would not in his other answer.

Q. You heard the testimony this morning of Mr. Morris to the effect that he came over from Philadelphia during the years 1906 to 1910 on about
281 three occasions, did you not? A. Yes.

Q. He mentioned a Mr. Davey as being manager of the adjusting department of Johnson & Higgins at that time, are you the Mr. Davey he referred to? A. Yes.

Q. He also testified that he obtained from underwriters on behalf of Johnson & Higgins—he gave to underwriters in behalf of Johnson & Higgins these counter-guarantees. Was that or was that not in accordance with the practice of Johnson & Higgins?

A. It was not in accordance with the practice of Johnson & Higgins, I don't think that he testified
282 that it was done in New York, but the Philadelphia office so far as adjusting was concerned was managed or supervised from New York because at that time there was no average adjuster in the Philadelphia office.

By the Commissioner:

Q. You were asked on your direct by Mr. Campbell whether the testimony by Mr. Morris in a certain respect, you may remember the question, was the fact or not? A. Yes, I remember the question was asked.

283

Q. And you said it is not the fact, it is misleading, I would like you to develop that, is that a limitation or qualification of your conclusion or what did you mean? A. I will tell you just what I meant, I was embarrassed by that question because it was difficult to answer yes or no. It was misleading in this way, we always took the position that the underwriters owed in full both under their policy and guarantees. Occasionally we would meet a recalcitrant underwriter, where there was a comparatively small amount involved, who would decline to pay except on the basis of the insured 284
value. In such cases we were confronted with either accepting his payment or suing for a very small amount, $10.00 or under, perhaps maybe $15.00, anyway an amount which would not warrant the expense of litigation that is what I meant by his statement being misleading.

Cross Examination by Mr. Lyeth:

Q. Well, was his testimony correct with respect to the entries on your books or incorrect? A. It was correct to the extent as I have just explained 285
in the last answer.

Q. Do you say that Johnson & Higgins did not accept short payments from underwriters where the contributory value was greater than the insured value? A. Well, I answered that in my other answer, in my long answer, our position always was and our advices to our clients always were that the underwriters owed in full, but we did in trifling amounts accept settlement—we were either forced to do that or go to suit for a small amount and the victory would have been a hollow one.

286 Q. Did you do any of the collecting yourself during this period? A. Yes, I have done everything in the office.

Q. When did you actually make collections? A. I am still making them.

Q. Have you read the testimony of Mr. Lange? A. No.

Q. Mr. Lange was employed in the adjusting department? A. Yes, he was a clerk in the adjusting department.

Q. Did he become the head of the collection de-
287 partment while he was there—I will read his testimony.

The Commissioner: Let the witness read it.

Q. Will you read the testimony beginning at the bottom of the first page and the second page.

Witness does as requested.

Q. (Repeated) Did he become the head of the collection department while he was there? A.
288 Well, it could hardly be termed collection department, there were not more than two people in it, he may have become the senior collector, but I don't recall that.

Q. You have read his testimony? A. Yes, down to the cross-examination.

Q. Do you say that that testimony is not true? A. What part of it?

Q. Any part of it—

The Commissioner: I don't think it is proper to characterize the whole testimony.

289

Q. (Continued) the answer beginning at the bottom of page 4.

The Commissioner: It is to be presumed that the witness testified the facts, ask him about the facts.

Q. His testimony was to the following effect: "The procedure was to bill in the first instance the underwriter who had given a general average guarantee, and if because of the difference between the insured value and contributory value the underwriter did not pay in full, we then billed the signer of the average bond and asked him to pay the difference". Is that correct? A. Partly so in that the question rarely arose, when it arose we dealt with it as I explained in my long answer to Judge Veeder's question.

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Q. Have you gone through your collection book? A. No, I didn't know I was going to testify until 11.29 this morning.

Q. Is Johnson & Higgins the broker for the Standard Oil Company? A. Which Standard Oil Company?

Q. Of New York. A. Well I think we do some business for the Standard Oil Company of New York, at the present time their fleet is not insured, but I believe we do their cargo business.

291

Q. Were you their brokers in 1904? A. I couldn't say.

The Commissioner: When you say broker, do you mean did they do any brokerage business for that company in that year?

Mr. Lyeth: Yes.

A. (Continued) We have done business for the —that is before the Standard Oil was split up, isn't

292 it—we have done business more or less for the Standard Oil Company, the parent company, the Standard Oil Company of New Jersey, the Standard Oil Company of New York and some of the other companies more or less ever since I have been connected with Johnson & Higgins but I am not sure that we did all their business, my recollection is that some of their business we did not, some of the times when they went uninsured, that is would carry their own insurance—they haven't had a very settled policy in that respect.

293 Q. Do you remember the case in 1904 of the bark "Kentmere"? A. No, I don't, sir.

Q. Do I understand your testimony, Mr. Davey, that Johnson & Higgins did not accept short payments from underwriters on average contributions except in cases where the difference was trivial? A. That is right, and always without prejudice.

Q. It appears on Respondent's Exhibit C that in May, 1904, on the bark "Kentmere" the general average contribution due from the cargo of the Standard Oil Company of New York was $2,013.00 and the collection from the Atlantic Mutual was $1,446.89, have you Mr. Davey seen this Respond-
294 ent's Exhibit C, being a list of the cases of the Atlantic Mutual? A. I don't know, two or three years ago I was shown a piece of paper, whether that is the one or not I don't know, but I did not examine it at the time.

Q. It was examined in your office though, wasn't it? A. I don't know, I remember some talk about examining it but whether it was done or not I can't say, I think that came in just before I was going to Europe in 1925.

Q. It was before that? A. That was apparently not the paper I am talking of.

295

Q. In January, 1908, the case of the "Renee Rickmess", it appears that the general average contribution due from the Standard Oil Company of New York was $1,101.47, of which the Atlantic Mutual insured three-quarters amounting to $826.10 and the Atlantic Mutual paid $604.00, a difference of $222.00—would you call that trivial? A. I should call it a trifling amount to sue over.

Q. Didn't you as a matter of fact collect the balance from the Standard Oil Company? A. I don't recall that we were the adjusters in that case, were we?

296

Q. Yes, you were. A. Very likely we did.

Q. As a matter of fact, Mr. Davey, have you any specific instance in mind—can you cite any specific instances where the amount was not collected—the difference was not collected from the assured? A. The other underwriters on the "Gulf Light" with one exception all paid in full.

Q. Any others? A. Specific cases no, because that was a matter there were too many of those things passing through the office all the time and too much a matter of detail to come before me personally, going back 20 years I don't pick out specific cases in my mind.

297

Q. Then Mr. Davey isn't your testimony that you have given in answer to Mr. Campbell's question pretty hazy? A. What was his question?

Q. As to the custom or lack of custom between underwriters and their assured with respect to the final payment of general average contributions where the contributory value was in excess of the insured value? A. Well, I don't consider it hazy, it may be specific but here is a matter that I am saturated with after 31 years and I am speaking solely from the standpoint of my experience and recollection.

298 Mr. Lyeth: Objected to and move to strike out the answer, just answer my question.

The Commissioner: He has answered it.

Q. You can't recall a specific instance where the assured failed to pay the excess of general average contribution where the contributory value was greater than the insured value? A. No, I can't change my answer on that question.

Q. You say you haven't looked at the collection books during any of the period to which you have
299 testified? A. No, I didn't know I was going to testify until one minute before I came to Mr. Campbell's office this morning.

Q. You have had many conferences with respect to this case with Mr. Campbell as to the question of custom or no custom? A. Yes, I have discussed it with him.

Q. And you haven't gone into the question of whether there were any instances to support your statement that there was no custom? A. No, because I am so satisfied that there is no custom, it is something that exists today.

Q. We are not talking about today. A. I know,
300 but there has been no change in the situation.

Q. But what happened prior to 1916? A. There has been no change in the situation to my knowledge in the last 31 years except that today, I think the question comes up more so today than it did some years ago.

Q. There was no change in the practice prior to 1910 and 1910 to 1915 or 1916? A. I can recall no change in the practice during those years.

Q. Well, do you mean to testify that the collection books of Johnson & Higgins do not show many cases where the underwriters have paid short? A.

301

Well, I haven't testified anything in that respect, Mr. Lyeth.

Q. You testified that Mr. Morris' testimony was incorrect? A. No, I did not, I beg your pardon, you asked me whether his—

Q. I am speaking about your testimony on direct examination, Mr. Morris testified that he saw in the collection books many instances where the underwriters had paid short on the average contributions where the contributory value was greater than the insured value and you said that that testimony was incorrect or misleading? A. Yes, and 302
when Judge Veeder asked me to explain what I meant by that I said it was a question I couldn't answer yes or no, it embarrassed me and I answered it as I did, he then asked me the question, that is the first answer I made this afternoon, I repeat that answer now.

Q. Then Mr. Morris' testimony as to what the collection books of Johnson & Higgins show is correct, is it? A. To the extent that I have already answered.

Q. Where the underwriter paid the average contribution in the cases where the contributory value 303
was greater than the insured value, you would have no knowledge as to whether or not the underwriter collected the excess due to the excess of contributory value, from the assured? A. I would have no knowledge if the assured was not a client of Johnson & Higgins, I know it would be impossible in cases of vessels outward bound where the average claim is assigned by a Chinaman or somebody in Japan or somebody in South America, in those cases if there were guarantees accepted, settlements were always made under those guarantees in full.

Q. So that your only knowledge on the subject

304 would be derived from cases in which Johnson & Higgins were brokers? A. That would be my actual experience, of course I have been in contact with insurance men all my business life.

Q. The collection book referred to by Mr. Lange would show the cases where the underwriters paid short, would it not? A. It would show the actual collections made.

Q. Well, isn't it a fact, Mr. Davey, that there were a great number of cases where Johnson & Higgins collected short from the underwriter? A.
305 No, sir, if that condition obtained we would not have accepted guarantees of underwriters and if any such thing happened from now on we would not accept guarantees of underwriters, we would want other security, we consider the guaranty a primary obligation.

Q. Well you say then that it did not happen, you would not accept short payments from underwriters? A. Well I will have to answer that—I have already answered it in reply to Judge Vessler when I sat down.

Q. Well, do I understand that it was only where
306 the amounts were trivial? A. Yes, I cannot recall a single case where amounts were large enough before this case to warrant litigation—that is speaking from the standpoint of Johnson & Higgins as a broker.

Q. No, I am talking about Johnson & Higgins as an adjuster. A. Oh, as an adjuster we want settlement in full, I am not aware that we have taken any settlements less than in full.

Q. From underwriters? A. Yes.

Q. At any time? A. Yes.

Q. Has anyone in your office made any record of instances where the underwriters paid short? A. Not that I am aware of.

307

Q. Referring again to Mr. Lange's testimony, page 6 to the end of the direct examination? A. Yes.

Q. Will you say that that testimony is not true?

The Commissioner: I would like to know what it is.

Mr. Lyeth: Mr. Lange testified that—

The Commissioner: Why don't you ask him the fact without regard to Mr. Lange's testimony, if that is what you want.

308

Q. Do you state positively, Mr. Davey, that collections short on general average contributions were not accepted by Mr. Lange? A. I can't say what Mr. Lange accepted, I have not said anything to qualify what I said when Judge Veeder asked me a question.

Q. I show you the last two pages of Respondent's Exhibit C, memorandum of general average settlements on cargo on excessive contributory values, and ask you to look at the cases where Johnson & Higgins are shown as adjusters there? A. Yes.

309

Q. Will you say that those records are not correct, that you did or did not accept those payments short as adjusters? A. I cannot answer that question as to any of these things but I will say it does not show what the Atlantic Mutual tendered us, whether when they handed us the amount shown here there was the additional amount due from the consignees or not.

Q. It has been testified that they did not? A. I didn't know that.

Mr. Campbell: I beg your pardon, there has been nothing of the sort, all the testi-

310 mony has been is that the Atlantic paid the amounts here and that the Atlantic did not pay the difference, but no testimony to the effect that the assured did it. That is what he just said. What you are suggesting now is that Johnson & Higgins as adjusters accepted short payments.

Mr. Lyeth: Mr. Davey says that they did not.

311 A. (Continued) What I said in respect to that was that that shows the Atlantic paid a certain amount of money, whether that represents their net payment or their gross payment or whether they handed us a check for the net amount and a further check from their assured for the difference I can't say, I can't testify anything about that because I have no recollection about it.

Q. But you said you have positive recollection that you did not accept payments from underwriters short of the total contribution? A. I think that is our practice, I am not aware of any differences from it—I will qualify that as I said in my answer to Judge Vesder's question.

312 The Commissioner: If the amounts were trivial or not worth suing on.

Q. Well, what do you consider a trivial amount, what is the up limit, I want to get some idea of whether $5.00, $10.00, $100.00 or what? A. Well, I consider a trifling amount an amount that is not sufficient to sue for.

Q. Well, it has been testified that these instances that I have pointed out to you in this memorandum represent payments short by the Atlantic of the

313

general average contribution, that the differences were not paid by the Atlantic and they were accepted by Johnson & Higgins?

Mr. Campbell: But you don't produce any testimony that the balance that wasn't paid by the Atlantic was not paid to the adjusters.

Mr. Lyeth: By the assured?

Mr. Campbell: Yes.

Mr. Lyeth: On the contrary, there is every assumption that it was paid.

314

Mr. Campbell: Mr. Davey said as adjusters they collect 100 per cent.

Q. You said you collect 100 per cent from either adjusters or assured? A. That is what we seek to do, of course.

Q. Then you don't mean to say that—I understand your testimony that you never accepted payments from underwriters short of the full amount—now we are talking only about underwriters, you understand that? A. Are you talking about a guaranty or about a claim under an insurance policy?

315

Q. I am talking about a case where the contributory value is in excess of the insured value—where the underwriter is given a guaranty? A. All right.

Q. Do you say that you do not accept and that you never have accepted except in trivial instances, payments from underwriters less than the full amount? A. Yes, I have said that and I have said further that if that were not so we would not accept an underwriter's guaranty.

Q. I am not talking about cases where you subsequently collected. I am speaking of in the first

316 instance from the underwriter—it has been testified here that this list of cases is a record of cases where the Atlantic Mutual has paid short of the full general average contribution and Johnson & Higgins are the adjusters on a large number of them and that they did not pay the difference.

Mr. Campbell: You have no testimony here to show that when they came to collect the cargoes' contribution in general average that the Atlantic did not obtain these differences from its own assureds and hand its own checks plus a check for the difference to the adjusters and make the collection that way.

317

Mr. Lyeth: I have Mr. Eldert's testimony in that respect.

Mr. Campbell: His testimony was that this list showed the amounts you people paid.

Mr. Lyeth: Mr. Eldert testified that they paid that much and that the adjuster went and got the balance from the assured.

Mr. Campbell: I don't understand that is so, if that was the case then your guarantees certainly would be discredited in the market, they don't mean what they provide then.

318

Q. I am talking about these cases, these cases are cases where the Atlantic Mutual in the first instance did not pay in full and presumably the adjuster Johnson & Higgins collected from the assured because the Atlantic Mutual did not pay the difference—now do you say that that is not true? A. I say that is not a fair presumption, I have said that I don't remember those things, they are too far back.

319

Q. Do you say that— A. Wait a minute—I say that on the record which you have asked me to examine it shows payment from the Atlantic, I don't know whether that is a net payment or gross payment, it is quite possible and is done occasionally by underwriters I believe that they will make a collection from their insured and pay us in full, I cannot say whether the Atlantic made us a gross payment or net payment, if they say that is their net payment and Mr. Eldert has testified, I believe Mr. Eldert.

320

Q. Do you say that Johnson & Higgins never accept payments on general average contributions from the underwriters short of the total contribution and bill the assured for the difference? A. I have not said that, I have answered that question.

Q. I ask you now. A. I have not said it and I don't say that, I have already answered the question before.

Q. Well, then you do accept short payments and bill the assured for the difference? A. Occasionally in the circumstances I have stated, but if any company tried to maintain that basis of settlement with us, we would not accept their guarantees, they would not be worth anything.

321

Q. You have said that several times, I want to get your actual knowledge and specific cases—you say that you never accept payments short and bill the assured for the difference except in trivial cases, is that right? A. That is right.

Q. Have you ever collected from the Atlantic in the first instance the full general average contribution where the contributory value was in excess of the insured value, prior to 1916? A. I cannot remember a specific case—on the other hand my recollection is that our settlements from the At-

322 lantic have been in full unless there is a trifling amount involved where we have gone to the consignee, in those cases we may have been forced to accept settlement without prejudice.

Q. As a practical matter on various cargo consignments the amount is usually not very large, isn't that true? A. No, the amounts may be very large and they may be trifling, the whole amount may be small, $1.00 or $40,000.

Q. You have no recollection of an instance where you had a controversy with the underwriter as to
323 the payment short in the first instance? A. Every time an underwriter wants to settle that way there is a controversy, you asked me before about the Atlantic and I told you I could not remember any specific case with the Atlantic.

Q. Can you remember any specific case with any underwriter? A. Where there was a controversy or where I have collected in full?

Q. Yes, either? A. No, I answered that before, I said the only case I remembered was the "Gulf Light" and I have collected from the underwriters with one exception.

324 By Mr. Campbell:

Q. That is this case? A. Yes.

Mr. Campbell: Will you admit that Johnson & Higgins is one of the leading brokerage and adjustment firms in New York?

Mr. Lyeth: Yes.

325

PERCY G. CRAIG, recalled:

By Mr. Lyeth:

Q. In the present case of the "Gulf Light", did the Atlantic have any reinsurance? A. We had no reinsurance.

Adjourned until March 24th at 2 o'clock.

March 24th, 1927. 326

Met pursuant to adjournment.

Present as before.

Mr. Campbell: If the Commissioner please, we would like to call one further witness for a very short examination, Mr. Mayhew, of the Insurance Department, State of New York.

327

K. S. MAYHEW, being duly sworn and examined as a witness for the libellant, testified as follows:

By Mr. Siddall:

Q. What is your present position? A. I am with the Liquidation Bureau of the Insurance Department of the State of New York.

Q. How long have you been there? A. Been there approximately three years.

328 Q. Will you outline your past experience in the marine insurance business for the Court? A. From about 1900 to 1918 I was in the office of Mr. Simpson, Mr. Simpson representing the British & Foreign Marine Insurance Company, the Reliance Marine Insurance Company, Ocean Marine Insurance Company, the Maritime Insurance Company and the American & Foreign Insurance Company—for a year following that I was with the Marine Department of the Automobile Insurance Company, in the New York office; the following three years, I
329 was an officer of the Maritime Underwriters Agency, which agency represented about seven or eight large companies writing a large volume of business in New York—do you want me to mention those companies?

Q. Never mind. A. For about a year after that with the Western Insurance Company, settling certain features of their business; then followed my connection with the Bureau.

Q. Were you in New York all the time? A. In New York the entire time, and during this period in charge of the settlement of losses under marine
330 insurance policies issued by the companies represented.

Q. Were the companies which Mr. Simpson represented English or American? A. English with the exception of one, the American & Foreign, which was practically owned by English companies.

Q. Will you state specifically what your duties were while you were with Mr. Simpson from 1900 to 1918? A. I was in charge of the Loss Department, in charge of the settling and determination of the liability of those companies under their contracts of insurance as issued.

Q. Did that include both hull and cargo? A. In-

331

cluded both hull and cargo, and Mr. Simpson was at that time getting a fair share of business in this American representation.

By the Commissioner:

Q. Who was Mr. Simpson? A. Underwriter for these four or five companies, the head in charge of the entire State.

By Mr. Siddall:

332

Q. Did you have pass through your hands claims under cargo policies to reimburse the insured for contribution assessed against his interest? A. All these cargo policies and claims arising under them while in that office and subsequent also.

Q. While you were in this work in Mr. Simpson's office did you have occasion to discuss questions of practice of other marine underwriters? A. Yes, we were in constant touch with them as we would have a share in the same policies or be interested in the same cases.

Q. Were you familiar with the practices in other insurance offices? A. Yes.

333

Q. Through these contacts and discussions with other marine underwriters? A. Through contact and also through contact with brokers and adjusters who were collecting losses from us.

Q. I want you to take a case under an ordinary valued cargo policy without any special clauses and suppose that the assured is assessed a contribution in general average on goods insured at a contributory value which exceeded the insured value, can you tell me whether during the period from 1900 to 1910 there was any settled custom among underwriters in New York as to whether they would

334 settle with the assured upon the basis of full indemnity or whether they would give the assured only partial indemnity in the proportion which the insured value bore to the contributory value? A. The general custom was to pay in full.

By the Commissioner:

Q. That is up to the— A. Up to the face value of the policy, regardless of the real value of the goods.

335 By Mr. Siddall:

Q. Were there any exceptions to that? A. There were exceptions to that, that was you know shortly after the "St. Paul" decision.

Q. I am asking about from 1900 to 1910, I am asking if there were any exceptions to this practice of paying in full? A. Yes, occasional exceptions where the underwriters could get the contribution from the assured he would do that, but he was met with opposition right away because there was a very strong thought in the Street that
336 the underwriters' liability was full liability up to the face of his policy.

Q. During this same period from 1900 to 1910, what was the practice in your own office? A. The practice was not to take counter-guarantees or endeavor to collect from the assured except in special cases, that was more particularly in connection with settlements under foreign policies issued in England that we were settling agents for—those were policies issued in England on incoming shipments, being English contracts, and we were settling agents for the office issuing them, that would be the Home Office of the company.

337

Q. When a ship came in under average and certain of your cargo was on board, would you customarily give an average guaranty to secure release of the goods? A. We would, it is an unlimited guaranty.

Q. Where you gave such guarantees, would you in cases take counter-guarantees from the assured for any excess that might be claimed on account of the contributory value being in excess of the insured value? A. Occasionally, particularly in connection with these foreign policies or where we did not care whether we would jeopardize the connection or not.

338

Q. Was there any settled practice in your office or in the business in general to take counter-guarantees in all such cases? A. There was not.

Q. Do you remember the Maldonado decision? A. I do.

Q. Have you any special reason for remembering it? A. Yes, I had charge of the case after the District decision under instructions from Liverpool in connection with the employment of New York counsel to assist in the appeal.

339

Q. The British & Foreign Company was the respondent in that case, was it? A. Yes.

Q. Do you remember about when that case was decided? A. I think that case was after or about 1910, wasn't it, or somewhere around there?

The Commissioner: November 1, 1910.

A. (Continued) We tried to get a writ of certiorari there and failed.

Q. Did that decision have any effect on the practice in your office? A. We absolutely abandoned any attempt to collect from assured on their un-

340 insured interest—if you could call it uninsured interest.

Q. So that after 1910 you settled with the assured on the basis of full indemnity in all cases? A. We settled with the adjuster under a guaranty, making no attempt to collect from the assured.

Q. Your company— A. Our liability is direct to the adjuster under the guaranty.

Q. What did the companies in general in New York do after 1910? A. I never heard of anybody objecting to that situation after the "Maldonado"
341 decision—seriously objecting.

By the Commissioner:

Q. In other words the practice was to collect in full? A. To collect in full.

Q. Has there been any change from 1910 to the present time? A. None that I know of.

Cross Examination by Mr. Lyeth:

Q. Did the American & Foreign Insurance Company do anything but reinsurance? A. No, they
342 did direct business, they took a certain percentage of the business written in Mr. Simpson's office, it was divided up into shares, they might have a direct policy or they might have a share.

Q. But the majority of their business was reinsurance, wasn't it? A. It was not.

Q. Now did you discuss this or can you remember any occasion on which you discussed this question of practice with any other underwriters outside of your office or Mr. Simpson's office? A. I cannot remember a specific case.

Q. Well, you can't say that beyond the practice in your own office what other offices were doing?

343

A. Yes, my understanding as a general thing they did not do it, from my conversations with them, if they could have got away with it I would have tried it.

Q. Well you did get away with it as you call it. A. Occasionally it was possible to do that.

Q. Well how often did you have a case where there was an excess contributory value? A. That would happen quite often.

Q. They were pretty occasional, weren't they? A. Yes.

Q. Rather rare? A. No, not rare, quite often. 344

Q. Well, you were representing of course underwriters? A. Underwriters, yes.

Q. And you don't mean to say that you did not attempt to collect from your assured the excess contributory value—the excess of average contributions with the excess of contributory values? A. It was principally in connection with these foreign policies.

Q. Well but I mean you did collect them? A. Yes, I did.

Q. Well, is the British & Foreign an English Company? A. Yes, incorporated in England but its New York office is a domestic corporation in the eye of the law in New York State. 345

Q. Well, you did on both foreign and domestic policies collect the excess average contributions from your assured? A. Yes—it was rather rare.

Q. Well you did it when you tried to, didn't you? A. Yes.

Q. You took some counter-guarantees from your assured, did you not? A. Yes, principally in connection with these foreign policies.

Q. But the question of whether or not you took a counter-guarantee would not have any bearing

346 on the question whether you could collect the excess average contribution? A. No.

Q. Ordinarily at the time you would give a guaranty to an average adjuster you would not know whether or not there was an excessive contributory value or not, would you? A. Very seldom.

Q. Mr. Mayhew, you don't know of any instances where insurance companies not represented by Mr. Simpson in your office did not attempt to collect excess of average contributions from their assured? A. I think it was a rare occasion for them to at-

347 tempt to collect.

Q. Well, I am just asking not what you think, what you know. A. It is my understanding from contact with these other companies that it was a rare occasion to collect, the attempt would probably drive the business out of their office because of competition.

Q. Well, but you don't know of any cases where they did not collect or where they did not attempt to collect? A. I cannot specify at this late date.

Re-direct Examination by Mr. Siddall:

348 Q. You have said that on some occasions you took counter-guarantees and on some occasions you tried to collect the excess from the assured, you mean that you did that prior to 1910, don't you? A. Yes—not after the "Maldonado" decision—abandoned it absolutely after the "Maldonado" decision.

Q. Did you always succeed in collecting this excess from the assured where you tried to? A. I did not, there was friction.

Re-cross Examination by Mr. Lyeth:

Q. Can you remember any specific instances where you failed to collect? A. I cannot specify

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but I can remember a great many cases when I did not.

Q. When you did not attempt to collect? A. No, where I attempted and could not, and my principals stopped me because of jeopardizing the connection.

Mr. Lyeth: I should like to put Mr. Eldert on the stand to get in the record the answer to some questions that your Honor ruled out but afterwards you decided you would take this testimony subject to objection or motion to strike it out.

350

CORNELIUS ELDERT, recalled:

By Mr. Lyeth:

Q. Does or does not an assured frequently obtain from an underwriter a settlement of a loss which is the subject of a general average before the general average settlement is prepared? A. Yes.

Q. How is the settlement in such a case made with the assured?

351

Mr. Campbell: Objected to as being entirely immaterial to the issues in this case, it is not a proper way of proving custom which they are attempting to prove as part of their obligations. Furthermore the witness has not even been asked to show that there was any such general custom. When that question was propounded to him before he said he knew what his own company did.

The Commissioner: You are talking about what your own company did?

352

The Witness: I am talking of what is within my knowledge, that is practically what our own company did.

The Commissioner: I will take it within reasonable limits.

Exception.

A. In the first case, the first instance, it is made as a particular average settlement and when the statement of general average is prepared we take credit for the amount made good and if that is
353 based upon a contributory value in excess of the insured value, we make an apportionment of those credits and pay to the assured the portion that belongs to him and retain the portion that belongs to the company under the previous settlement of particular average.

Q. You retain that proportion of the general average credits due to the insured value? A. Due to the insured value, yes.

Q. Is or is not that done irrespective of whether the underwriter is made whole and receives the total amount of the loss previously paid? A. Oh yes, I don't think we have ever been made whole
354 in such a transaction.

Q. Mr. Eldert, has Johnson & Higgins ever refused to accept a general average guaranty from the Atlantic Mutual? A. No.

Mr. Campbell: I can't see what it has to do with custom.

The Commissioner: It bears on Mr. Davey's testimony.

Q. Have Johnson & Higgins ever threatened to refuse to accept the Atlantic's guaranties because

355

of the practice of your paying short on average contributions where the contributory value is in excess of the insured value?

Mr. Campbell: Objected to as immaterial.
Overruled.
Exception.

A. No.

By Mr. Campbell:

356

Q. You have been testifying simply as to the practice of your own company, have you not? A. Yes, I have.

Mr. Campbell: I produce and ask to have marked in evidence the form of general average guaranty which was requested by counsel.

It is marked Libellant's Exhibit 1.

Adjourned until March 31, 1927, at 2:30 P. M.

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March 31st, 1927.

Met pursuant to adjournment.

Present as before.

Both sides rest.

Mr. Campbell: I move to strike out Exhibits C and D.

The Commissioner: Were they marked in evidence?

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Mr. Lyeth: They are both marked for identification.

Mr. Campbell: I move to strike them out because they are immaterial, irrelevant, incompetent and insufficient to prove a general custom as alleged in respondent's answer. The evidence shows that these exhibits are a resume of certain entries in the books of the respondent which show that in those particular cases they paid their assureds or to general average adjusters on the basis for which they contend in this case. They are merely the
359 records of particular instances of practice alleged to have been indulged in by one of the very large number of marine insurance companies doing business in New York. Furthermore they are not complete records even showing the practice of this company, for it has been admitted by Mr. Craig that the exhibits do not contain any reference to those cases in which they paid on the basis of the full indemnity for which we are asking in the suit. They could be material in the case only as bearing upon the issue of custom and as such we say are insufficient, incompetent and irrelevant for the reasons stated.

360 The Commissioner: Is that all your motion?

Mr. Campbell: Yes. I am not going to move as against the other testimony as I suggested the other day. I am content to have that testimony left on the record and will argue upon that testimony.

The Commissioner: Sitting as Commissioner I shall formally deny your motion and treat these documents on the basis of their probative effect, if any, in the memorandum disposing of the entire issue. I do this because of my desire to have in the record the material on which the Court may

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pass if my judgment upon the matter is wrong. Is there anything else? Do I understand that you agree that it is the custom prevailing in New York that controls in this case, if any? You have both argued on that assumption but I would like it to be explicit?

Mr. Campbell: I cannot answer that in the affirmative because we do not admit that there is any custom.

The Commissioner: I said if there is any custom.

362 Mr. Campbell: If under any circumstances any custom was to control we would admit that it was the custom of New York.

The Commissioner: And that it is the law of New York that is to apply to this issue, do you agree to that—that is what you have both been trying to prove.

Mr. Lyeth: You mean as distinguished from the law of the Second Circuit, the Southern District—you mean the State law?

The Commissioner: The law of this port, put it that way if you like, you agree to that, do you?

363 Mr. Campbell: Yes, I agree that it is the law of this Circuit and this port that you have to apply to this case.

Mr. Lyeth: Yes.

The Commissioner: Is that all?

Mr. Campbell: That is all.

Mr. Lyeth: Yes.

The Commissioner: Let me have a memorandum, but make it brief, on custom, by one week from today.

Hearing closed.

364 **Libellant's Exhibit 1.**

New York,.....19

MESSRS. JOHNSON & HIGGINS, NEW YORK.
WILLCOX, PECK & HUGHES, INC.

In consideration of the delivery from the S/S
of the following goods, viz:

Shipped by.....
Consigned to
365 without the requirement of a deposit, we hereby guarantee the payment of all General Average, Salvage and/or Special Charges for which said goods are liable.

Respondent's Exhibit A.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

366 GULF REFINING COMPANY,
Libelant,
against
ATLANTIC MUTUAL INSURANCE COMPANY,
Respondent.

Deposition taken pursuant to notice on behalf of respondent at 1051 Insurance Exchange Building, Chicago, Illinois, February 28, 1927, at 11:30 A. M., before Minnie M. Meyer, Notary Public.

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Messrs. Kirlin, Woolsey, Campbell, Hickox & Keating by Mr. R. B. Siddall appeared on behalf of the libelant.

Messrs. Carter, Ledyard & Milburn by Mr. J. M. R. Lyeth appeared on behalf of the respondent.

It is stipulated that the testimony may be taken by a stenographer, signing, filing and certification being waived; stenographer's fees to be taxable.

368

ANDREW G. LANGE, being duly sworn and examined as a witness for the respondent, testified as follows:

Direct Examination by Mr. Lyeth:

Q. What is your name? A. Andrew G. Lange.

Q. Where is your residence? A. 1615 Chase Avenue, Chicago, Illinois.

Q. Are you about to sail for Europe? A. Yes, I am sailing on March 4th from St. John.

Q. What is your business? A. Insurance broker and Average Adjuster.

369

Q. What is the name of your firm? A. Osborn & Lange, Inc.

Q. Do you have offices in Chicago and New York? A. Yes, in Chicago and New York.

Q. How long have you been in the insurance business? A. Since 1904 or 1905, I am not sure of the exact date.

Q. Were you at any time employed by Messrs. Johnson & Higgins? A. Yes, I was employed by Johnson & Higgins from the time I started, either in 1904 or 1905, until 1916.

370 Q. Were you in their New York office? A. Yes, I was in New York until about February, 1909.

Q. What departments were you in at Johnson & Higgins in New York? A. In the Adjustment Department.

Q. Did you have charge of the collection of General Average Contributions? A. For a part of that time my recollection is that I was in the Collection Department, for the last two or three years, finishing in February, 1909, but I was not in charge of the Department all that time. I started in as an
371 assistant in there and sometime during that time I became head of the department.

Q. When you left there in 1909, you were at the head of the Collection Department? A. Yes.

Q. Was it a part of your duties to collect average adjustments, collect contributions? A. Yes.

Q. While you were in the collection department did you have general average adjustments for collection where the contributory value of the cargo was greater than the insured value? A. Yes, we had some; I could not name the specific cases.

Q. In such cases what was the practice with re-
372 spect to collection from the underwriter of contributions where the contributory value of the cargo was greater than the insured value?

Mr. Siddall: I object to the question on the following grounds: my first objection is that the question is immaterial, incompetent and irrelevant. And with your permission I should like to retain that objection throughout all of his testimony. My point is that whatever the practice was in 1909 or 1910 does not make any difference.

Mr. Lyeth: I agree that you may retain that objection throughout.

373

Mr. Siddall: I also object to the question as being indefinite. I presume it was the practice to collect the average adjustments that were adjusted.

A. The procedure was to bill in the first instance the underwriter who had given a general average guarantee, and if because of the difference between the insured value and contributory value the underwriter did not pay in full, we then billed the signer of the average bond and asked him to pay the difference.

374

Q. Will you state whether or not you would then bill the signer of the average bond for the difference? A. Yes, we build the signer of the average bond and asked him to pay the difference, giving him the figures furnished by the underwriter or insurance company, showing how the deficiency was arrived at.

Q. Did the signer of the average bond in most cases pay that difference? A. Of course, it is pretty hard to say very definitely, it is so long afterwards, but my recollection is that they usually did.

375

Q. You cannot recall any specific cases, the name of the ship or the name of the underwriter after this length of time? A. No.

Q. And you, of course, have no records by which you can refresh your recollection? A. No.

Q. Was there any record kept in the office of Johnson & Higgins with respect to these collections where the underwriter paid short? A. A record of all items to be collected was kept in what we called a collection book, and if there was a short payment a notation was usually made in the collection book.

376

By Mr. Siddall:

Q. Would there be anything in the collection book to show why the payment was short? A. I do not believe so.

By Mr. Lyeth:

Q. If the difference was later collected from the consignee or merchant would that be shown in the collection book? A. Yes.

377 Q. Will you state whether or not from your recollection this practice so far as your experience is concerned was universal? A. I do not know that.

Q. I mean from the collections you made? A. I do not know whether I understood your question. When I say "I do not know that" I mean I do not know what the practice in other offices was. I am just talking about my own experience.

Q. That is all I was asking about, about your office? A. I was not sure I understood you.

Q. I am limiting my question solely to that. A. To the best of my recollection that was the cus-

378 tomary procedure.

Mr. Lyeth: That is all.

Cross Examination by Mr. Siddall:

Q. How old are you, Mr. Lange? A. I am not quite forty-five yet.

Q. So that when you left New York you were about twenty-six? A. I was not quite twenty-seven yet. In other words, I was forty-four on September 15th last.

Q. You were about twenty-seven when you left New York? A. Yes.

379

Q. You were with Johnson & Higgins about five years? A. About that, I am not certain. I came with Johnson & Higgins either in 1904 or 1905, I am not sure.

Q. You were five years with them in their New York office? A. Yes.

Q. And then went to Cleveland? A. Yes.

Q. And stayed with them in Cleveland until 1916? A. Until the 1st of October, 1913, when I moved to Chicago, and I was with them in Chicago from October 1, 1913, to June 1, 1916.

Q. When you joined with Mr. Osborn? A. Yes. 380

Q. You never were an average adjuster while you were with Johnson & Higgins in New York, were you? A. No. I will say no.

Q. Your work was in the adjusting department but collecting? A. Yes, prior to leaving New York I had not actually prepared any average adjustments.

Q. When you take an average guarantee from an underwriter the underwriter is liable for the full amount of his contribution on the guarantee irrespective of the terms of his insurance? A. Yes.

Q. So that when you had an underwriter's guarantee the underwriter was liable for the full general average contribution on his guarantee? A. That was my understanding. 381

Q. If the underwriter did not chose to pay it all, you asked somebody else really as a favor to the underwriter, because the underwriter was liable for it all?

Mr. Lyeth: Objected to as calling for the conclusion of the witness, and asking for the witness' legal opinion on the law.

A. No, that is not right.

382

By Mr. Siddall:

Q. Did Johnson & Higgins always bill the underwriter for the full contribution? A. When I was there we always billed the underwriter in the first instance for the full amount.

Q. In practically all cases the underwriter would be liable for the full amount because he had given an average guarantee?

Mr. Lyeth: Same objection, calling for a conclusion and calling for the witness' opinion on the law.

383

By Mr. Siddall:

Q. Are you an average adjuster? A. Yes.

Q. You have been a member of the Average Adjusters Association, full member? A. Yes.

Q. For how long? A. I cannot tell you from memory.

Q. Since 1909? A. Yes.

Q. You are familiar with the laws of general average, are you not? A. Yes.

384 Q. Don't you apply the law of general average? A. Supposed to know something about it.

Mr. Siddall: The witness is an average adjuster of eighteen years standing. I think he can qualify to answer questions on the law.

Q. Did you know a man by the name of William Gow in New York while you were there, a Marine Underwriter? A. No, I never knew there was—

Q. You know who William Gow is? A. I thought I knew, I did not know he was an underwriter in

385

New York, I thought he was an underwriter in Liverpool.

Q. I am telling you he was in New York, he may not have been there the exact years you were there? A. He may have been.

Q. You are familiar with the book he has written, published in 1914? A. Yes.

Q. You are familiar also with the English rule in connection with general average claims against Underwriters where the contributory value exceeds the insurance value, are you not? A. I do not know that I am.

386

Q. You are not familiar with it? A. I am not sure that I know what you have reference to.

Mr. Siddall: That is all.

Re-direct Examination by Mr. Lyeth:

Q. After you left New York, Mr. Lange, did you become an average adjuster for Johnson & Higgins in Cleveland? A. Yes.

Q. And you were an average adjuster during the time you were with Johnson & Higgins in Cleveland and in Chicago? A. Yes.

387

Q. As a matter of fact, Mr. Lange, the merchant or the consignee generally paid the difference between the total general average contribution and the amount the underwriter paid? A. That is my recollection.

Mr. Lyeth: That is all.

Re-cross Examination by Mr. Siddall:

Q. You mean they generally paid, there were a good many instances when they did not? A. I

388 cannot recall after eighteen years any details, but my impression based on my recollection is that as a rule they did pay.

Mr. Siddall: That is all.

By agreement of counsel hereto the signature of the witness to the foregoing deposition was waived.

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389 **Respondent's Exhibit "B."**

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

GULF REFINING COMPANY,
Libellant,
against
ATLANTIC MUTUAL INSURANCE COMPANY,
Respondent.

390

Deposition taken pursuant to notice, on behalf of the respondent, at the office of Messrs. Carter, Ledyard & Milburn, 54 Wall Street, New York City, March 20, 1925.

APPEARANCES:

Messrs. CARTER, LEDYARD & MILBURN (Mr. Lyeth and Mr. Johnson), for the respondent.
Messrs. KIRLIN, WOOLSEY, CAMPBELL, HICKOX & KEATING (Mr. Campbell), for the libellant.

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It is stipulated that the testimony may be taken by a stenographer, signing, filing and certification being waived, stenographer's fees to be taxable.

EDGAR G. GAUDESABOOS, being duly sworn and examined as a witness for the respondent, testified as follows:

By Mr. Lyeth:

392 Q. What is your business? A. Insurance broker and claim settling agent.

Q. Where is your office? A. In Antwerp.

Q. How long have you been in that business? A. About 14 years.

Q. During all that time in Belgium? A. No, I have been in Belgium approximately six years, in England a year and a half and the balance in this country.

Q. Have you represented insurance companies? A. Yes.

Q. Have you settled losses? A. Yes.

393 Q. Have you settled losses involving general average? A. Yes, and particular average adjustments resulting from general average.

Q. And your business has been settling agents for underwriters? A. For underwriters.

Q. Are you familiar with the customs and practices respecting settlements in foreign countries? A. In Belgium and England; and as far as Roumania, Germany, Italy, France and Switzerland are concerned, we used to represent companies of those countries and settle general average and particular average claims, which we paid to the consignees in Belgium.

394

Q. And you are familiar with the customs as to the settlement of general average losses in those countries? A. Yes, the way they are settled in Belgium.

Q. Have you settled losses arising out of general average where the contributory value of cargo was greater than the insured value? A. Yes.

Q. Many of such losses? A. Yes, we had a great many in our office.

Q. Approximately how many per year would you say? A. I should think a minimum of a hundred

395 a year passed through my hands.

Q. That is a hundred different claims where the contributory value of cargo was greater than the insured value? A. Yes.

Q. In these countries that you have mentioned, what in your opinion is the custom and practice with respect to the settlement of such losses where the contributory value is greater than the insured value? A. It is my opinion that the underwriters only pay in the proportion that the insured value bears to the contributory value, since we have settled all claims on that basis. I have never seen one adjustment with the exception of American

396 adjustments which were settled otherwise.

Q. You have settled all claims on that basis? A. Yes.

Q. Except claims against American companies? A. Yes, except American claims.

Q. Has any question ever arisen with respect to such settlements? A. No, we have never had any complaints.

Q. Then in all the cases that you have settled except claims against American companies, you have never paid the cargo assured the full amount of general average contribution where the contrib-

397

utory value in general average was greater than the insured value? A. No, we never did, we took the exact percentage that the insured value was compared to the contributory value and based that percentage of the loss—

Q. That is, you took the proportion or the percentage of the insured value to the contributory value and multiplied it by the general average contribution against the particular cargo insured? A. Yes.

Q. And that in your judgment and opinion is the custom and practice in these countries you have mentioned? A. Yes, it is. 398

Q. And these countries you refer to are England, Belgium, France, Italy, Germany, Switzerland and Roumania, is that right? A. That is it.

Q. When are you sailing from the country? A. Tomorrow.

Q. You are going back to Belgium? A. Yes.

Cross Examination by Mr. Campbell:

Q. You say that you have had approximately a hundred cases passed through your hands the last 14 years? A. No, per year. 399

Q. Per year? A. If it was a big general average case for which we are claim agents for the whole cargo we might have a hundred general average claims on a cargo on one single steamer.

Q. I see. What you meant to say was that you have perhaps had a hundred claims a year pass through your hands? A. Yes.

Q. Not a hundred different general average cases? A. No, I don't mean that.

Q. You might have one general average case and out of that settlement of a hundred different

400 claims? A. Yes, but that would have to be very big.

Q. Are general average cases so frequent that you would have as large a number as that passing through your hands per year? A. Yes, because we were the only adjusters in Antwerp, all general average cases in Antwerp pass through our hands. It is not like in this country, in Antwerp you have three adjusters, Van Peborgh, then the second one is Genicot and the third name is Langlois, these three men form what they call a triumvirate.

401 There is no possibility for any other adjusters, no matter how much experience he has, to become an adjuster in Antwerp, it is impossible because they have to be appointed by the Tribunal of Commerce, they appoint those three adjusters and consequently all adjustments pass through their hands.

Q. You weren't a member of one of these adjusting firms? A. No, but I was handling the cargo claims in their office.

Q. You were handling the cargo claims in their office? A. Yes.

Q. And were these settlements that you made, settlements that were made on adjustments pre-

402 pared in Belgium by those adjusters? A. Sometimes, not always, we have adjustments prepared in Germany, for instance.

Q. Take for instance an adjustment made in Germany, what would you do, settle with the Belgian claimants? A. Yes.

Q. For the German insurance companies? A. Yes.

Q. Or the Belgian companies? A. For the Roumanian companies too—you see, before we have a lot of grain cargoes which come from Braila, that is in Roumania, the boat stopped usually in Havre, from there to Antwerp and from there to Germany.

403

If there was a general average case in the Mediterranean before they reached Havre, it was practically always—the adjustment was practically always made up in Germany and these people in Antwerp had to contribute—the people who took the matter on the claims which were presented to us under the German adjustment.

Q. Then you, acting for the— A. For the companies.

Q. The various insurance companies? A. Yes.

Q. Would pay to the Belgian cargo owners who had contributed to general average? A. Yes.

404

Q. So that the payments that you were making —the settlements that you were making, were settlements with cargo owners residing in Belgium? A. Yes.

Q. You wouldn't make a settlement with the cargo owners residing in France, for instance? A. No, the policies provide for a different agent in France.

Q. You wouldn't make a settlement with a cargo owner residing in Roumania? A. No.

Q. Nor with a cargo owner residing in Germany? A. No.

Q. Nor in Switzerland? A. No.

405

Q. All that you did was to make settlements in Belgium with cargo owners residing in Belgium? A. Yes.

Q. Supposing that the contributory value of the cargo was less than the insured value, then on what basis would you settle? A. The underwriters pay in full.

Q. You disregard then the contributory value of the cargo? A. Yes.

Q. You have regard only to the valuation fixed in the policy? A. Yes.

406

Q. You never resided in Switzerland? A. No.

Q. Or Roumania? A. No.

Q. Or Italy? A. No.

Q. And you have never done business in those countries, never had an office there? A. I have never had an office there.

Q. As I understood, your experience was confined to a year and a half in England, six years in Belgium and apparently six and a half in the United States? A. Yes.

Q. When did you come to the United States? A.
407 It was six and a half—you can increase that by a year in Belgium and decrease the United States a year.

Q. When did you come to the United States? A. I came to the United States the beginning of 1916.

Q. Have you ever had cases of constructive total loss of cargo in those countries where there was an abandonment of cargo to underwriters? A. Not that I remember, not that we settled, we may have been interested, but I don't remember one settlement.

Q. Are you able to testify what would be the
408 basis of settlement if there was an abandonment of cargo to the underwriting interests, where the actual value of the cargo in sound condition exceeded the policy valuation—that is to say, under those circumstances would the cargo underwriters take all of the cargo on an abandonment? A. On an abandonment?

Q. Yes. A. Yes.

Q. That is to say, in the case of a constructive total loss on cargo where there was an abandonment, the underwriters would claim the entire residue of the cargo that there was to be abandoned

409

and would disregard any increase in the value of the cargo that might have resulted in a change of market condition, so as to make the actual value in excess of the valuation stated in the policy? A. I should think so.

Re-direct Examination by Mr. Lyeth:

Q. With respect to this last question, you have had no experience with respect to a constructive total loss? A. No, none.

Q. You are just expressing— A. Just expressing my personal opinion for the reason that no Belgian underwriters are ever very strong on an abandonment, once it is abandoned, they try to save as much as possible—they pay very promptly, practically in two or three days settle the total loss. 410

Q. As a matter of fact, an abandonment is the conveyance of all rights? A. Yes, the conveyance of all rights, so if the underwriters take possession of the cargo, the consignee has conveyed all his rights to the underwriters, consequently the underwriters have the right—

Q. As a matter of fact, it is a gamble? A. Yes, because the underwriters usually look to the value in the case of such losses, always. 411

Q. When a cargo owner abandons to an underwriter, he is really gambling on the outcome of the salvage? A. On the outcome of the salvage.

Q. And if the underwriter wins on the outcome, he keeps the profit? A. Yes.

Q. That is your opinion? A. That is my opinion, it is a gamble of the underwriter.

Q. I am not sure whether I got this in direct —you are now in business for yourself? A. Yes.

Q. What is your firm? A. E. G. Gaudesaboos Company, Antwerp.

412

Q. How long have you been in business for yourself? A. Four years.

Q. And that business is settling agent for underwriters? A. For underwriters and insurance brokers.

Q. When you spoke about an average of 100 claims involving general average losses where the contributory value is greater than the insured value, you meant 100 different claims on different lots of cargo? A. Yes, that is what I mean, I don't mean 100 different general cases, I should think the
413 average of general cases might be between 15 and 25.

Q. Per year? A. Yes.

Q. Involving this question? A. Yes.

Re-cross Examination by Mr. Campbell:

Q. You don't have this question arise on all general average cases? A. That is the merchandise pass through our hands?

Q. No, but this particular question of the basis on which the underwriters pay the cargo owner, or the contributions which the cargo owner may be
414 required to make in general average—those questions don't arise on all questions of general average? A. It is very seldom there isn't one, I should say practically every case.

Q. Due to fluctuation in the value of cargo? A. Maybe, or to under-insurance, that the shippers don't insure enough, it happens very often.

Q. They don't value high enough, you mean? A. Yes, the market value is much higher than the insured.

Q. The market value is much higher than the insured? A. Yes, or since the cargo is shipped

there is a continual rise in the cargo, it goes up all the time. 415

Q. But in cases of constructive total losses, the cargo underwriters insist upon the valuation agreed upon and stated in the policy, being binding upon the owner? A. Well, it is like this, once the underwriters pay constructive total loss, they insist on receiving all rights to the cargo from the consignees and naturally everything that comes from the cargo they will insist to get the proceeds of, once they have full right to get it.

Q. Yes, but when you come to settle a general average loss where the cargo has increased in value, then the underwriter takes the position that the cargo owner has an uninsured interest in the cargo? A. Yes. 416

Q. And that the valuation which they have agreed upon and stated in the policy is not binding upon the underwriters? A. Not binding upon the underwriters.

Q. But if there was a constructive total loss of cargo on the same ship on which the general average arose, the underwriters would disregard the agreed value of the cargo in the policy and insist that he was entitled to all of the cargo that was saved and abandoned to him, and would only have to pay a loss based upon the value stated in the policy? 417

Mr. Lyeth: I object to the question because it is irrelevant to the issues here inasmuch as in a constructive total loss no question of valuation is raised, it is merely a conveyance of rights by the insured to the underwriters.

418 A. The underwriter never would question the value of the cargo if he didn't receive the right of the consignee. In general average cases the underwriters do not ask to convey rights to the underwriters, it is only upon settling a total loss they really insist upon it. If the consignee did not insist on a total loss, the underwriters would never insist to have full right in the salvage.

Q. Supposing that you had cargo valued at $100,000 in a policy where the amount insured was only $50,000 and you had a constructive total loss? A.
419 Yes.

Q. The cargo underwriter would not expect to take all of the recovery out of cargo that might have been saved—he would only take 50 per cent, wouldn't he? A. Once the consignee would have given him all rights to take 100 per cent, he would take it.

Q. He wouldn't expect 100 per cent when he only insured 50? A. No, but when a consignee insists upon a total loss on his policy, the underwriter will say give me the rights to the cargo and in exchange for that, he will insist on total salvage.

420 Q. Even though he had insured only 50 per cent? A. I would think so.

Q. And the underwriter over there then would insist on all the cargo irrespective of what might be the amount insured or the valuation taken in the policy? A. Once he gets the rights, I should think so.

MEMORANDUM OF GENERAL AVERAGE S

Record	Folio	Adjuster	Vessel	C
15	9	Anthony & Chew	Bct. Happy Return	Oct.
	12	Wreaks & Chubb	Bk. Francisco T.	Apl.
		" "	"	
	30	Max Suremont Fils Ed Von Peborg	Str. Rhone	Feb.
	32	J R. Telfair	Sp. Lord Lytton	Feb.
	38	Johnson & Higgins	Str. Rotterdam	Apl.
	44	Johnson & Higgins	Str. Thingvalla	Apl.
	48	J. Russell Bradford	Sp. Sea Witch	Feb.
	51	J. R. Telfair & Richard O. Lovett	Sp. Benj. Sewall	Dec.
	57	Johnson Higgins & Krebs	Str. Colon	Aug.
	82	Wreaks & Chubb	Str. Cohanino	Oct.
	83	Winship Bros. & Gore	Str. United States	Oct.
	130	Wreaks & Chubb	Str. Egadi	Jan.
	153	Walker & Hughes	Str. Victoria	Nov.
		" "	"	

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Respondent's Exhibit C.

AVERAGE SETTLEMENTS ON CARGO ON EXCESSIVE CONTRIBUTING VALUES.

Casualty	Assured	Total G/A.	Proportion G/A Pd.	Difference	Year Pd.
Oct. 20/1879	Maitland Phelps & Co.	$494.75	$470.39	$24.36	1880
Apl. 11/1880	H. K. & F. B. Thurber & Co.	7.00	5.73	1.27	"
	Augusta Taber & Bro.	8.00	5.75	2.25	"
Feb. 10/1880	Lewisohn Bros.	1,135.28	1,043.48	91.80	"
Feb. 22/1880	Wood Payson Colgate	883.60	415.98	467.62	"
Apl. 1880	Purdy & Nicholas	25.67	22.23	3.44	"
	J. H. Smith & Sons	6.86	2.53	4.33	"
	P. W. Engs & Co.	7.01	4.67	2.34	"
	Cuthert & Co.	3.63	2.60	1.03	"
	Geo. Watson, Jr.	18.19	16.59	1.60	"
Apl. 1880	Ferd. Bing & Co.	31.21	20.07	11.14	"
Feb. 2/1880	Ira Bursley	1,127.19	1,102.75	24.44	"
Dec. 1879	Ira Bursley	816.32	662.09	154.23	"
	V. W. Brinkerhoff	469.64	390.87	78.77	"
Aug. 1876	Baker & Hamilton	35.42	34.32	1.10	1881
	Marcus C. Hawley & Co.	128.86	117.14	11.72	"
	Jos. Lynch	19.77	18.30	1.47	"
	H. Herrmann & Co.	30.61	27.82	2.79	"
	Dunham Corrigan & Co.	(392.62)	134.99	10.69	"
	2950.				
	Atlantic Ins. 8580.	145.68			
Oct. 1880	Casade Crooks & R.	9.09	4.00	5.09	"
	H. K. & F. B. Thurber & Co.	192.20	181.00	11.20	"
Oct. 1880	J. Rosenheim	36.39	21.53	14.86	"
Jan. 11/1881	W. H. Schieffelin & Co.	9.43	5.81	3.62	"
Nov. 1880	E. Fougera & Co.	20.15	15.10	5.05	"
	E. Remington & Sons	163.22	154.75	8.47	"

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423

Record	Folio	Adjuster	Vessel	Casualty
	8	Edward R. Ivy	Str. Aransos	Jan. 2/87
		"	"	
	19	Walker & Hughes	Sp. Vanloo	Feb. 1887
	37	Johnson & Higgins	Bk. Conquistatore	Aug. 1887
	79	Walker & Hughes	Sp. Thomas Dand	Oct. 1887
	184	Jas. Gaskill	Bg. Odorilla	Sept. 1888
20	30	J. R. Telfair	Sc. James A. Garfield	Feb. 1889
	43	Walker & Hughes	Sc. Jennie A. Cherry	Apl. 1889
	45	R. Langrishi Marc. St. Johns N. F.	Bk. Florence	Apl. 1889
	56	W. E. Boyd	Bgt. Aquatic	Mch. 1889
	58	Walker & Hughes	Bk. Emma G. Scamwell	Apl. 1889
	63	" "	Bk. C. W. James	Oct. 1888
	88	Johnson & Higgins	Sc. Razoulo 1	July 1889
	99	Jones & Whitlock	Sc. H. S. Marlor	May "
	104	Johnson & Higgins	Sp. Sapphire	Aug. "
	124	Henry Stewart	Bk. Marquis of Lorne	Apl. "
	130	Curry & Whitney	Sc. Iolanthe	Sept. "
	184	Jas. B. Kellogg	Str. Buffalo	Dec. "
21	2	Johnson & Higgins	Str. Panama	Apl. 1890
		"	"	
		"	"	
	15	J. B. Kellogg	St. Ira H. Owen	July 1890
	32	Walker & Hughes	Sc. Ella H. Barnes	Sep. 1890
	34	Johnson & Higgins	Str. Runic	May 1890
	50	"	Str. Alhanca	July 1889

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dity	Assured	Total G/A.	Proportion G/A Pd.	Difference	Year Pd.
7	Morgans La. & Texas R. R. Co.	24.22	22.43	1.79	1887
8	"	116.22	95.47	20.75	"
r	"	195.41	182.91	12.50	"
r	"	51.19	47.58	3.61	"
	"	217.91	167.31	50.60	"
r	"	544.89	407.55	137.34	"
7	Sondheim Alsberg & Co.	17.66	7.78	9.88	"
r 7	Levy & Levis	26.64	24.42	2.22	"
7	Ross & Co.	435.39	393.57	41.82	1888
s	Thebaud Bros.	623.89	606.51	17.38	"
9	Lawrence Turnure & Co.	$756.69	$743.34	$13.35	1889
9	Boston Sugar Refining Co.	361.15	273.66	87.49	"
					428
r9	Harvey & Co.	1,548.65	938.94	609.71	"
0	St. Lawrence Sugar Refg. Co.	2,440.70	2,268.68	172.02	"
r9	Moale Bros.	220.05	92.50	127.55	"
3	Smith & Schipper	108.24	104.02	4.22	"
0	"	2,633.15	2,266.13	367.02	"
	A. Lueder	224.44	221.21	3.23	1890
	Jas. Brond	208.61	98.04	110.57	"
	H. J. Baker & Co.	94.43	89.03	5.40	"
Pe	Edw. Kidders Son	1,311.64	1,156.65	154.99	"
	Wm. Onderdonk & Co.	488.06	473.37	14.69	"
ld	Colgan & Co.	529.14	499.70	29.44	1891
os.	McDowell Pierce & Co.	125.74	116.66	9.08	"
	Thos. McMullen & Co.	35.49	34.28	1.21	"
bu	Geo. W. Campbell, Jr.	137.28	128.66	8.62	1890
)	Hy. P. Havers	78.67	75.86	2.81	1891
n)	J. L. Mott Iron Works	24.80	21.30	3.50	1890	429
)	Mosbacher & Co.	30.90	30.07	.83	1891
	"	18.52	16.54	1.98	"
	"	6.18	5.03	1.15	"

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Record	Folio	Adjuster	Vessel	Casualty	Assur
	154	Johnson & Higgins	St. Maas	Jan. 1881	Sondheim Als
	160	Wreaks & Chubb	Bk. Aurora	Mch. 1881	W. A. Brown
	168	Winship Bros. & Gore	Sp. F. S. Hersey	June 1881	Zuricaldy & Standard Sug
	178	J. R. Telfair	Bk. Eva H. Fisk	June 1881	J. L. & D.
	187	Winship Bros. & Gore	Bkt. Mount Lebanon	May 1881	Standard Sug
	188	Wreaks & Chubb	Str. European	Aug. 1881	Wm. Ewart
	196	Winship Bros. & Gore	Sp. Portland Lloyds	June 1881	Standard Sug
16	47	Johnson & Higgins	Str. State of Georgia	Dec. 1881	Wm. Griffin
	53	"	Bk. Arlington	"	Rosenstein Br
	"	"		"	Purdy & Nic
	106	Winship Bros. & Gore	Bk. A. T. Stallknecht	July 1882	J. F. Tucker
	132	G. E. Thomas	Bg. Olacilius	Oct. 1882	P. I. Nevins
	157	Thos. S. King	Sc. Four Brothers	May 1883	Gustave Ran
	200	Johnson & Higgins	Sp. Suhote	June 23/83	R. Colgate & V. W. Brinc
	208	J. R. Telfair	Sp. Young America	July 31/83	Reid & Bain Tyson Mining J. W. Cooper H. Schauglin
17	114	Geo. Marsden & E. Erdman, Havana	Sc. P. I. Palmer	Nov. 1884	Krajewski &
	117	E. A. Kellogg	Sc. Geo. Shattuck	Jan. 1885	Chas Twing
	126	Winship Bros. & Gore	Bk. Nereide	Oct. 1884	Cyros Wakefi
18	115	Jones & Whitlock	Sc. E. A. De Hart	July 6/1886	Rosenstein Br
	116	Wreaks & Chubb	Bk. Hermod	Aug. 5 1886	F. M. Arquin
	174	Statement not Presented	Str. C. Lincoln	Feb. 1887	Dickerson Va
19	1	Jas. Carey, Coale & Cunningham	Str. Albano	Dec. 28/86	Dana & Co.

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	Total G/A	Proportion G/A Pd.	Difference	Year Pd.
& Co.	19.27	15.67	3.60	1881
Co.	27.50	22.40	5.10	"
umbau	267.90	243.41	24.49	"
Refinery	957.73	924.56	33.17	"
iker	118.53	107.85	10.68	"
Refinery	8,327.70	6,539.38	1,788.32	"
on	799.80	793.48	6.32	1881 or 1882
Refinery	2,560.82	2,381.59	179.23	"
	$59.68	$17.83	$41.85	1882
	442.53	434.18	8.35	"
s	34.91	27.28	7.63	"
Co.	914.54	429.40	485.14	1883
on	290.74	255.71	35.03	"
Prest.	64.20	42.80	21.40	"
Co.	406.39	368.23	38.16	1884
off	241.64	230.80	10.84	"
	301.60	277.75	23.85	"
Co.	162.18	135.15	27.03	"
	37.46	35.70	1.76	"
	110.85	104.39	6.46	"
ant	201.53	168.76	32.77	1885
	22.70	19.73	2.97	"
& Co.	1,161.94	1,086.03	75.91	"
	22.40	20.87	1.53	1886
	108.86	103.16	5.70	"
u	82.48	78.55	3.93	"
Dusen & Co.	35.49	33.04	2.45	1887
	3,239.32	3,103.21	136.11	1887

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	Record	Folio	Adjuster	Vessel	Casualty	Assured
		67	Mosbacher & Co.	St. C/New York	Oct. 1889	Humphrey Hy H. Hahlo & I. Modry & J. V. Farwell M. Arnold & Cohen Bros. A. Van Berg
		91	J. R. Telfair	Bk. Henry Norwell	Feb. 1889	Edw. Kidder
		97	Hy. Stewart	Bk. Zebina Gondey	June 1890	Nova Scotia
	21	105	Cunningham & Coale	Str. Levo	Oct. 1890	J. Bonday, J
		116	Hy. Stewart	Bk. Chas E. Lefurgey	Nov. 1890	Jas. Brand
		124	Johnson & Higgins	Str. Asiatic Prince	Mch. 1891	N. Y. Tartar
431		125	Curry & Whitney	Bk. Flora	May "	Mosle Bros.
		130	Jones & Whitlock	Str. Alvo	Apl. "	G. Amsinck
		155	Theo W. Gore	Str. Gurly	Aug. "	H. Dumois &
	22	11	Johnson & Higgins	Str. C/Para	Aug. 1889	G. Amsinck
			" "	"	"	A. Zordik &
			" "	"	"	"
		36	E. F. Hitchcock	Str. Japan	June 1891	Wm. Onder
		48	Jones & Whitlock	Sp. Mary L. Cushing	Apl. 1891	D. A. Shaw
		52	E. F. Hitchcock	Str. Newburgh	Aug. "	Royal Baking
		53	Johnson & Higgins	Str. Hippolyto Dumois	Dec. "	Hippolito Du
		82	Hy. Stewart	Bkt. Hector	Apl. 1892	B. S. Pray
		85	Johnson & Higgins	Str. Finance	Oct. 1890	Brazilian Tra
		91	" "	Str. Schiedam	July 1891	J. Kridel So
		164	Jacob R. Telfair	Str. Orizaba	Mch. 1892	Thebaud Bro
		173	Johnson & Higgins	Str. Dorchester	July "	Balto. Chron
	23	20	Theo. W. Gore	Str. Wilhelm Oellsner	Feb. 1892	H. A. Batjer
432	"	"		" "		Gault Bros.
		22	Heyward & Wreaks	Str. Indian Prince	Jan. 1893	H. B. Kirk
		64	Johnson & Johnson	Str. Scheidan	" "	Kahn Blum
		175	Jones & Whitlock	Str. Spree	Nov. 1892	I. Strauss
				"		W. & J. Slo
				"		Benjamin &
				"		L. Toplitz &

	Total G/A.	Proportion G/A Pd.	Difference	Year Pd.
o Md. Co.	8.43	7.42	1.01	1891
	1,192.07	997.61	194.46	"
	120.98	111.46	9.52	"
Co.	203.10	50.99	152.11	"
o.	232.49	214.33	18.16	"
Co.	70.56	64.17	6.39	"
Co.	384.08	365.34	18.74	"
on	326.08	319.28	6.80	"
ar Refg. Co.	24,910.11	23,481.30	1,428.81	"
Co.	1,346.98	1,273.04	73.94	1891
	448.76	421.32	27.44	"
o.	41.74	39.31	2.43	"
	298.44	297.10	1.34	"
Co.	174.92	156.56	18.36	"
o.	173.60	67.10	106.50	"
Co	$455.86	$345.82	$110.04	1892
o.	43.29	38.90	4.39	"
	138.07	121.58	16.49	"
k	36.52	30.51	6.01	"
Co.	118.08	100.93	17.15	"
Pwd. Co.	170.39	107.88	62.51	"
is	486.81	303.64	183.17	"
Co.	35.72	29.47	6.25	"
ng Co.	201.60	187.64	13.96	"
& Co.	47.06	38.43	8.63	"
	3,203.98	2,952.31	251.67	1897
Works	23.41	16.69	6.72	1892 or 1893
Co.	44.46	26.73	17.73	1895
Co.	32.09	25.33	6.76	"
Co.	12.74	6.88	5.86	1893
Sperringer	49.75	33.70	16.05	"
	127.92	104.67	23.25	1894
	24.11	20.30	3.81	"
aspary	73.32	68.02	5.30	1894
Co.	29.22	21.78	7.44	"

Record	Folio	Adjuster	Vessel	Casualty
	180	Johnson & Higgins	Str. Guildhall	Dec. 1893
	183	W. E. Boyd	Str. Hurona	May "
	187	Johnson & Higgins	Str. Vigilanca	Sep. 1892
	189	"	Str. Corean	Jan. 1894
24	4	M. V. Gillard	Sc. Walleda	Apl. 1894
	6	J. R. Telfair	Str. Island	Jan. "
	19	Heyward & Wreaks	" California	" 1893
	89	J. R. Telfair	" Alesia	Jan. 1895
24	116	Johnson & Higgins	Str. Mareca	Mch. 1895
	117	"	Str. Istrian	Feb. 1895
	123	"	Str. Euchantress	May "
	124	"	Str. Orizaba	
	161	Walker & Hughes	Sc. Exception	
	191	Hayward & Wreaks	Str. Colorado	
	199	W. E. Boyd	Str. Flamboro	
	9	Johnson & Higgins	Str. Hesperides	May 1896

Total G/A.	Proportion G/A Pd.	Difference	Year Pd.	
52.79	27.84	24.95	1896	
98.22	93.38	4.84	1894	
37.22	32.54	4.68	"	
5.37	1.19	4.18	"	
72.81	53.56	19.25	"	
41.87	25.17	16.70	"	
40.06	34.85	5.21	"	
61.67	57.73	3.94	1894	
132.55	71.50	61.05	"	
497.26	482.88	14.38	"	
69.15	42.60	26.55	"	
15.53	13.16	2.37	1895	
$2.68	$2.31	.37	1896	434
7.87	5.79	2.08	1896	
15.96	10.57	5.39	"	
143.31	109.35	33.96	"	
24.87	7.00	17.87	1895	
30.20	9.36	20.84	"	
84.25	35.04	49.21	"	
29.18	10.04	19.14	"	
51.53	17.83	33.70	"	
127.73	81.56	46.17	"	
21.66	19.58	2.08	"	
3,351.57	2,834.47	517.10	1896	
14.00	9.14	4.86	"	
2.28	1.52	.76	"	
2.04	1.83	.21	"	
15.98	15.19	.79	1896	
44.72	42.54	2.18	"	435
26.18	25.17	1.01	"	
4.32	3.15	1.17	"	
4.20	3.15	1.05	"	

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Record	Folio	Adjuster	Vessel	Casualty	Assurs
	14	J. M. Strachan	Str. Strathcarron	Dec. 1895	Acadia. Sugar
	53	Walker & Hughes	Str. Hesperia	Mch. 1896	Otto Hann &
					Lauritano Bro
	69	Johnson & Higgins	Bk. Saluto	Nov. 1896	Eppens, Smith
	79	"	Sc. Harriet C. Kerlin	Nov. 1896	Jas. Pyle & Sc
	82	"	Str. Victoria	Dec. "	W. R. Peters
	84	M. B. Edwards	Sc. Chas. J. Willard	Mch. 1897	L. G. Crosby
	92	Johnson & Higgins	Str. Aquelija	Jan. 1897	W. R. Peters
	106	"	Bk. Atlantic	Feb. 1897	H. A. Batjer
	120	"	Str. Manhanset	Mch. "	Tattersfield &
	121	"	Str. Finance	Mch. 1896	Chas. B. Seal
437					N. Y. & Hond
					Yale & Towne
25	123	Johnson & Higgins	Str. J. W. Taylor	Oct. 1896	The Union Ne
					Barclay & Co.
					J. Spencer Tu
	136	" "	Str. Cambrian	Feb. 1897	Mattewan Mf
					Abe. Stein Co
	138	Walker & Hughes	Str. Gluelg	Sep. 1896	Barclay & Co
	143	Hayward & Wreaks	Str. Holland	July 1890	Ira Bursley
					F. R. Arnold
	148	J. B. Brand Providence	Sc. James Parker, Senior	Nov. 1897	Hy Maurer &
	175	Johnson & Higgins	St. Ardandhu	Oct. 1897	Gillespie Bros
				" 1897	Bussin & Gra
	188	" "	Str. Eveline	Nov. 1897	Lazarus Rosen
	191	Jones & Whitlock	Str. H. H. Meier	Mch. 1897	Steiner, David
	198	" "	Str. Oevenum	June 1897	G. S. Nichola
438	26	43 Johnson & Higgins	Bk. Rita	Mch. 1898	A. D. Hitch
		52 Walker & Hughes	Str. C/Rome	June 1897	Wm. E. Hoope
		" "	" "	" 1897	W. A. Ross &
		" "	" "	" 1897	O. Jaffe & Pi
		57 Hy Stewart	Sc. Harry W. Lewis	July 1898	W. & A. Lear

...ered	Total G/A.	Proportion G/A Pd.	Difference	Year Pd.
...r Refg. Co.	2,839.94	2,796.84	42.40	1896
...l Bros.	41.69	34.71	6.98	1897
...Bros.	62.67	55.15	7.52	"
...lh & Wiemann & Co.	666.78	588.41	78.37	"
...Sons	444.66	406.28	38.38	"
...rs & Co.	10.46	3.64	6.82	"
...by	254.64	228.81	25.83	"
...n & Co.	76.94	30.77	46.17	"
...er & Co.	5.98	2.46	3.52	"
...l & Co.	573.05	553.52	19.53	"
...sbury	23.08	14.82	8.26	"
...nduras Rosario Mining Co.	172.92	163.42	9.50	"
...ne Mfg. Co.	43.89	35.41	8.48	"
...Nut & Bolt Co.	$168.56	$156.82	$11.74	1897
...Co.	523.88	476.25	47.63	"
...Turner	911.85	885.15	26.70	"
...Mfg. Co.	177.86	171.57	6.29	"
...Co.	1,926.59	1,708.21	218.38	"
...Co.	6.43	2.81	3.62	"
...	16.16	13.88	2.28	1898
...ld & Co.	11.85	8.98	2.87	"
...r & Son	127.94	110.65	17.29	"
...ros. Co.	4.79	3.05	1.74	"
...Graf	66.13	31.31	34.82	"
...osenfeld & Lehman	17.32	13.79	3.53	"
...Davidson & Co.	57.77	41.17	16.60	"
...olas	200.99	180.54	20.45	"
...ith	82.98	65.59	17.39	"
...Hooper & Son	28.22	20.84	7.38	"
...ns & Bro.	24.12	16.86	7.26	"
...& Pinkus	165.99	132.38	33.61	"
...Leaman	232.45	137.85	94.60	"

Record	Folio	Adjuster	Vessel	Casualty
	64	Johnson & Higgins	Bk. Formosa	Apl. 1898
		" "	" "	" 1898
	77	Walker & Hughes	Str. Capac	Apl. 1897
	79	F. S. Whitaker	Sc. Syanara	Sep. 1898
	80	Johnson & Higgins	Str. Maasdam	Nov. 1897
	86	Cunningham Coale & Co.	Sc. Luther T. Garritson	Nov. 1898
	136	Wm. Cunningham	" "	Feb. 1899
	86	Johnson & Higgins	Str. Pennsylvania	Apl. 1898
	88	" "	Str. Lacroma	July 1898
26	98	Johnson & Higgins	Str. La. Champagne	Feb. 1898
26	110	" "	Str. Illinois	Mch. 1898
	145	" "	Str. Ardondhu	July 1898
	169	" "	Str. Rhynland	Jan. 1899
	194	Hayward & Wreaks	Str. Roman Prince	May 1899
27	2	Johnson & Higgins	Str. Knight Errant	Sep. 1898
	60	E. T. Hitchcock	E. M. Peck	Nov. 1899
	86	Edward Cole	Sc. Georgetta Lawson	Feb. 1900

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Assured	Total G/A.	Proportion G/A Pd.	Difference	Year Pd.
W. A. Taylor & Co.	376.18	371.85	4.33	1898
Taber & Co.	217.16	210.46	6.70	"
Swan Finch Co.	71.52	64.63	6.89	1899
Johnson & Johnson	58.54	52.27	6.27	"
Sullivan & Wilson	1,486.32	1,478.91	7.40	1898
S. B. De Jonge	31.98	26.84	5.14	1899
Sullivan & Wilson	59.83	50.44	9.39	"
Wm. D. Gill & Son	433.60	409.37	24.23	"
C. P. Moorman & Co.	184.28	155.00	29.28	"
Porter Bros. Co.	56.13	47.32	8.81	"
Bouche Fils & Co.	$82.18	$72.02	$10.16	1899
Favor Ruhl & Co.	65.56	58.30	7.26	
C. F. Goepel Co.	58.65	51.83	6.82	
Rothschild Bros. & Co.	176.67	153.05	23.62	
Worthington, Smith & Co.	249.00	235.68	13.32	
Wm. Meyer & Co.	290.23	219.68	70.55	
J. K. Stiefel & Co.	53.80	41.54	12.26	
L. Toplitz & Co.	20.95	11.86	9.09	
J. Lowenthal & Co.	38.06	29.59	8.47	
Sigman & Weil	26.96	21.96	5.00	
Ferd. Bing & Co.	74.52	61.86	12.66	
Geo. Cohn & Co.	23.71	16.71	7.00	
Alegg & Rusch	154.25	144.98	9.27	
E. A. Morrison & Son	168.20	86.10	82.10	
Perkins Van Ingen & Co.	178.19	150.49	27.70	
C. P. Moorman & Co.	909.47	764.91	144.56	1899
Dillon & Co.	1,183.31	1,165.82	17.49	"
Marshall Field & Co.	3,047.67	2,488.95	588.81	"
Eppens, Smith & Wiemann & Co.	201.39	186.18	15.21	"
Marshall Field & Co.	504.54	478.85	25.69	1900
Mather & Co.	15.54	10.04	5.50	"
Booth & Lewis Lumber Co.	277.68	268.21	9.47	"

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	Record	Folio	Adjuster	Vessel	Casualty	Assur
442		100	Johnson & Higgins	Str. Thornhill	Feb. 1900	Standard Oil T. & B.
		101	" "	Str. Picqua	Oct. 1899	Rosenstein B
		104	Hayward & Wreaks	Str. Rappahanock	Dec. 1899	Marshall Fie
			" "	Str. "		Samuel Strei
		121	Walker & Hughes	Str. Indrani	Nov. 1899	A. Weil & E
		138	D. H. Wilcox	Str. Arabia	Aug. "	Mather & C
		144	Johnson & Higgins	Bge. John Fritz	Dec. 1899	" "
		158	Johnson & Johnson	Str. Hoathdene	Nov. 1899	D. P. Cruks
		176	E. A. Kellogg	Str. Theodore H. Rand	Nov. 1900	F. Woodruff
	28	14	Johnson & Higgins	Str. Grangense	Aug. 1900	R. Fabien &
				Str. "		Humphreys
443		25	Gore & Gore	Bk. Mabel I. Meyers	Jan. 1901	Eastern Salt
		54	T. J. Clark N. O.	Str. Winifred	Aug. 1899	McKean, Ei
		164	Johnson & Higgins	Str. Pleiades	May 1901	Atlantic & P
						"
		170	" "	Str. Westernland	Dec. 1900	Cohn Bros.
				Str. "		G. S. Nicho
						"
						Perkins, Van
	29	22	Johnson & Higgins	Str. Claverdale	Feb. 1901	Am. Rattan
						Ed. Bennech
						Carter Macy
		35	(A. P. Hall)	Bg. Francisca	Jan. 1902	F. Woodruff
		42	Walker & Hughes	Str. Ethiopia	Jan. 1901	Jas. Scott &
			" "	" "		Geo. D. Win
			" "	" "		O. Jaffe &
			" "	" "		Wm. Anders
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ured	Total G/A.	Proportion G/A Pd.	Difference	Year Pd.
il Co. of N. Y.	294.57	229.42	65.15	1902
Dept.				
Bros.	241.46	196.12	45.34	1900
eld & Co.	273.65	266.56	7.09	"
eit & Co.	85.84	69.92	15.92	"
Bros.	1,374.69	1,290.55	84.14	"
Co.	39.01	29.09	9.92	"
"	38.62	29.61	9.01	"
shank	235.58	220.57	15.01	1901
ff & Co.	112.95	65.48	47.47	"
k Co.	434.00	416.59	17.41	1902
H. Med. Co.	62.66	57.29	5.37	
lt Co.	202.37	193.15	9.22	1901
Eilers & Co.	96.96	56.63	40.33	1902
Pacific Co.	80.20	53.29	26.91	"
"	326.74	110.58	216.16	"
	26.63	17.55	9.08	1903
olas	210.77	191.16	19.61	"
	1,074.77	1,065.19	9.58	"
an Bergen & Co.	1,032.86	881.26	151.60	"
& Reid Mfg. Co.	264.49	241.35	23.14	1902
he & Bros	117.77	102.08	15.69	"
y & Co.	2,926.48	2,836.31	90.17	"
ff & Co.	409.37	258.10	151.27	"
& Sons	234.66	218.05	16.61	"
ister	394.84	386.55	8.29	"
Pinkus	86.24	69.15	17.09	"
rson & Co.	143.08	133.40	9.68	1902

Record	Folio	Adjuster	Vessel	Casua
29	58	Jones & Whitlock	St. Neckar	Feb. 190
29	102	Mather & Co. (N. Y.)	Str. Ferndene	
	161	E. A. Kellogg	Sp. Treasurer	
28	178	Johnson & Higgins	Str. Jamaica	Dec. 6
29	57	" "	Str. Jas. Turpie	Oct. 2
30	181	" "	Str. Pallanza	Sep. 2
30	85	" "	Str. Terrence	Oct.
31	61	" "	Str. Heathford	July
30	140	" "	Str. Manica	Nov. 19
	179	" "	Str. Kroonland	Dec.
31	71	" "	Str. "	"
		" "	Str. Jupiter	Nov. 19
(Boston)		" "		
29	130	Franz A. Boner Bremen, Settled Thro' J. & H. N. Y.	Bk. Nereide	Jan. 1
29	162	Jones & Whitlock	Sc. John R. Bergen	Apl.
30	12	" "	Str. Lahn	Jan. 1
		" "	Str. "	"
		" "	Str. "	"
30	32	Walker & Hughes	Str. America	May
		" "	Str. "	"

Respondent's Exhibit C.

Record	Folio	Adjuster	Vessel	Casualty	Assured	Total G/A.	Proportion G/A Pd.	Difference	Year Pd.
29	58	Jones & Whitlock	St. Neckar	Feb. 1902	Neustadter Bros.	$84.56	$75.01	$9.55	1903
					Abraham & Strauss	96.69	76.86	19.83	"
					Le Boutillier Bros.	171.02	157.97	13.05	"
					S. Guggenheimer & Co.	96.50	63.82	32.68	"
					Smith, Worthington & Co.	90.92	76.78	14.14	"
					Rothschild Bros. & Co.	57.93	50.06	7.87	"
					A. Blumenthal & Co.	196.91	174.98	21.93	"
					Lord & Taylor	757.17	737.92	19.25	"
					Hy Morgan & Co.	91.63	82.76	8.87	"
					J. H. Dunham & Co.	79.68	70.52	9.16	"
29	102	Mather & Co. (N. Y.)	Str. Ferndene		Cook & Bernheimer Co.	142.81	107.11	35.70	"
	161	E. A. Kellogg	Sp. Treasurer		Eastern Salt Co.	876.58	805.15	71.43	"
28	178	Johnson & Higgins	Str. Jamaica	Dec. 6/1901	H. Dumois & Co.	478.78	467.19	11.59	1902
29	57	" "	Str. Jas. Turpie	Oct. 25/1899	Arguimbau & Ramee	542.23	525.37	16.86	1902
30	181	" "	Str. Pallanza	Sep. 25/1902	J. H. Lau & Co.	93.10	80.10	13.00	1903
30	85	" "	Str. Terrence	Oct. 7/1905	Eppens, Smith & Wiemanns Co.	406.24	351.15	55.09	1904
31	61	" "	Str. Heathford	July 2/1903	Phila. & China Trading Co.	2,066.32	1,815.60	250.72	1905
30	140	" "	Str. Manica	Nov. 1903	Hoopel & Androvette	37.67)	31.46)	6.21)	"
						38.03)	34.73)	3.30)	"
	179	" "	Str. Kroonland	Dec. 8/1903	Marshall Field & Co.	50.75	42.26	8.49	"
31	71	" "	Str. "	"	Perkins, Van Bergen & Co.	133.29	101.35	31.94	"
		" "	Str. Jupiter	Nov. 1904	Nash Spaulding & Co.	13,558.95	10,790.07	2,768.88	"
(Boston)		" "							
29	130	Franz A. Boner Bremen, Settled Thro' J. & H. N. Y.	Bk. Nereide	Jan. 17/1902	Standard Oil Co. of N. Y.	612.97	426.42	186.55	1903
29	162	Jones & Whitlock	Sc. John R. Bergen	Apl. 8/1903	Herman Coal & Wood Co.	132.38	101.10	31.28	1903
30	12	" "	Str. Lahn	Jan. 18/1903	Spingarn Bros.	35.48	17.52	17.96	1903
		" "	Str. "	"	John Donat & Co.	96.59	79.15	17.44	1903
		" "	Str. "	"	Graf Brod.	89.44	75.33	14.11	1903
30	32	Walker & Hughes	Str. America	May 6/1903	Robt. Rossman	42.91	27.31	15.60	1903
		" "	Str. "	"	John Burke & Co.	20.76	12.77	7.99	"

Respondent's Exhibit C.

Record	Folio	Adjuster	Vessel	Casualty	Assured	Total G/A.	Proportion G/A Pd.	Difference	Year Pd.
30	60	C. H. Lewis	Sc. Gracia D. Buchanan	Nov. 6/1903	G. S. Baxter & Co.	1,038.02	911.98	126.04	1904
29	128	W. E. Boyd	Str. Lake Superior	Mch. 22/1902	J. B. La Liberte	57.31	39.41	17.90	1903
31	90	M. A. Newell & Co.	Sp. Hy. Villard	Jan. 1905	Chas. Bruner & Co.	771.65	766.63	5.02	1906
						56.92	33.90	23.02	"
						918.39	835.31	83.08	"
						137.70	46.88	90.82	"
						56.05	48.43	7.62	"
						189.53	172.89	16.64	"
						24.64	21.79	2.85	"
						80.62	72.16	8.46	"
						960.50	846.55	113.95	"
						407.83	322.05	85.78	"
	101	Johnson & Higgins	Str. Hekla	Mch. 1905	Schieffelin & Co.	2,433.37	2,145.42	287.95	"
	111	" "	Str. Mashona	June 1905	E. S. Halsted & Co.	210.74	112.15	98.59	"
	123	" "	Str. Wildenifels	Mch. 1905	"	211.51	203.54	7.97	"
	54	" "	Bk. Kentmere	May 1904	Standard Oil Co. of N. Y.	287.74	273.03	14.71	"
					Atlantic on 3/4	(2,013.00)	1,446.89	62.86	1905
	165	" "	Str. C/Washington	Aug. 1905	Barclay & Co.	1,509.75			
	175	Hy. Stewart & Son	Sc. Laura C. Anderson	Sep. 1906	W. D. Cook & Co.	139.42	60.03	79.39	1907
32	26	Johnson & Higgins	Str. Kingstonian	May 1905	Codman & Hall Co.	923.91	901.42	22.49	1906
					Roosevelt Schuyler	$34.24	$24.50	$9.74	1907
	146	Wilcox, Peck & Hughes	Str. Madonna	June 1907	R. Rossman	101.48	88.22	13.26	"
	180	Johnson & Higgins	Str. African Prince	Jan. 1908	Booth & Co.	35.23	26.06	9.17	"
33	15	" "	Sp. Renee Rickmess	Jan. 1908	Standard Oil Co. of N. Y.	1,024.12	998.87	25.25	1908
					Atlantic Ins. 3/4	(1,101.47)			
	18	" "	Str. Hellig Olav	Feb. 1908	Schieffelin & Co.	826.10	604.00	222.10	1909
	19	" "	Str. Hawaiian	Mch. 1907	T. H. Smith Agt.	8.05	4.18	3.87	"
	38	" "	Str. Charlton Hall	Apl. 1908	Barclay & Co.	69.81	52.88	16.93	1910
	43	J. T. Casey	Sc. Elrazar W. Clark	May 1907	Moss & Co.	8.55	4.77	3.78	1909
			" "	"	"	156.23	140.69	15.54	"
					L. A. Wight & Co.	807.02	781.30	25.72	"
	85	E. A. Kellogg	Sc. Benjamin F. Poole	Dec. 1908	Eastern Salt Co.	491.60	426.12	65.48	"
	121	Johnson & Higgins	Str. Kroonland	Dec. 1907	Perkins, Van Bergen & Co.	42.25	28.93	13.32	"

Respondent's Exhibit D.

Record	Folio	Adjuster	Vessel	Casualty	Assured	Total G/A.	Proportion G/A Pd.	Difference	Year Pd.
	137	Johnson & Higgins	Str. Montreal	Oct. 1907	Roosevelt Schuyler	83.69	57.43	26.26	1909
	162	Wilcox Peck & Hughes	Str. Kelvingrove	Aug. 1908	Barclay & Co.	61.20	28.46	32.74	"
	172	Johnson & Higgins	Str. Mongolia	Sep. 1906	J. C. Whitney Co.	724.10	675.76	48.34	1910
	"	"	"		Ignaz Strauss & Co.	252.34	213.45	38.89	"
34	27	"	Str. Mongolia						
			Str. Gerty	Oct. 1908	Meyer Bros. Drug Co.	74.80	66.79	8.01	1910
	37	Hy. Stewart & Son	Bk. Howard D. Trup	Jan. 1909	Standard Oil Co. of N. Y. G/A.	(2,659.19)			
					Atlantic 3/4	1,994.39	1,538.05	456.34	"
	55	Stetson & Co.	Sc. Cartagena	Nov. 1910	Franklin Baker Co.	1,152.39	1,025.09	127.30	"
	60	Johnson & Higgins	Bk. Comet	Dec. 1908	Rockhill & Vietor	448.69	396.20	52.49	"
	65	"	" Sp. Glendoon	Feb. "	Vacum Oil Co. of South Africa	(3,838.89)			
					Atlantic 3/4	2,879.17	2,671.32	207.85	"
	84	"	" Str. Suruga	Feb. 1909	Winter & Smillie	67.30	49.78	17.52	"
	167	Mather & Co.	Str. Bayamo	Feb. 1908	Barclay & Co.	978.87	371.10	597.77	1911
					Total	$156,368.38	$136,474.00	$19,894.38	

OFFICE OF ATLANTIC MUTUAL INS. CO.
New York May 5/1920

Respondent's Exhibit D.

MEMORANDUM OF GENERAL AVERAGE SETTLEMENTS ON CARGO ON EXCESSIVE CONTRIBUTORY VALUES.

Record	Folio	Adjuster	Vessel	Casualty	Total G/A	Proportion Paid	Difference	Year Paid		Assured
35	34	Johnson & Higgins	S/S Italian Prince	Oct. 28, 1909	120.98	94.49	26.49	1911		Barclay & Co.
"	110	L. A. Wight	Sch. Henry Weiler	Oct. 7, 1910	358.77	244.42	114.35	1911		N. A. Bemer & Co.
37	113	Wilcox Peck & Hughes	S/S Geo. A. Flagg	Nov. 27, 1912	223.35	174.49	48.86	1913		Calumet & Hecla Mining Co.
"	184	T. B. Hall & Co.	S/S Lassell	Feb. 1913	685.18	630.13	55.05	1913		G. S. Baxter & Co.
"	118	John Strachan	S/S St. Olaf	Nov. 1912	284.55	284.55	35.67	1913	Assured refunded difference	Dix & Wilkins
36	18	Johnson & Higgins	Bk. Astral	July 6, 1910	47.37	28.76	18.61	1912		Geo. H. Fay Co.

New York March 18, 1927.

454 **Stipulation as to Certain Facts.**

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

GULF REFINING COMPANY,
Libellant,
against
ATLANTIC MUTUAL INSURANCE COMPANY,
Respondent.
64-82

455

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties hereto for the purposes of this action, as follows:

I. The total amount of the charges of general average nature which were incurred as alleged in paragraph EIGHTH of the libel was $129,225.43.

The contributing values of the interests at risk were correctly calculated by the average adjusters as follows:

456

Vessel	$590,000.00	
Add amount made good	569.45	590,569.
Freight at risk	68,741.33	
Less wages and port charges	2,102.96	
Add amount made good	23,845.41	90,484.
Cargo	312,866.02	
Add amount made good	104,311.62	417,178
Total contributory values		$1,098,231

457

The proportion of general average was, therefore, 129,225.43/1,098,231 or 11.76669%.

The general average contribution found due from the cargo was 11.76669% of $417,178.00 or $49,088.04.

Said general average contribution of $49,088.04 was paid by the libelant as of February 24, 1916.

The said amount made good to cargo of $104,311.62 was received by libellant as of February 24, 1916. This represents the value of cargo sacrificed computed at the same market price as was used in computing the value of the cargo actually landed and delivered at Rouen.

458

The cargo, the contributory value of which is shown above as $417,178 is the same cargo which respondent insured against war risk in the sum of $27,690 valued at $212,000 as alleged in paragraph SIXTH of the libel. Attached hereto and marked Exhibit A is a correct copy of said policy of insurance executed and issued by respondent covering said cargo.

II. Under the law, practice and custom of England, France, Germany, Holland and Japan, payments under marine insurance policies on cargo of general average losses are made as follows: Where the contributory value in general average of the insured cargo is greater than the insured value of such cargo, the underwriter is required to pay under its policy only that proportion of the general average contribution due from such cargo which the insured value thereof bears to the contributory value thereof.

459

The facts stipulated in this section II are so stipulated reserving to libelant its objection that

460 such facts are wholly irrelevant and immaterial with respect to the issues involved in this case.

III. Respondent has paid to libelant and libelant has accepted all without prejudice to the contentions of either party hereto, the sum of $3,258.25 with interest from February 24, 1916. The said sum of $3,258.25 is the amount which respondent admits to have been due and owing to libelant according to the principles contended for by respondent on account of the aforesaid general average

461 losses.

If, therefore, respondent's contentions should by the court be sustained, the libel should be dismissed with costs. If, however, the contentions of libelant should by the court be sustained, a decree should be entered against respondent in the sum of $6411.54 less $3,258.25 already paid, that is to say $3,153.29 with interest at six per cent (6%) and costs.

Dated, New York, March 11, 1927.

KIRLIN, WOOLSEY, CAMPBELL, HICKOX & KEATING,
Proctors for Libelant.

462

CARTER, LEDYARD & MILBURN,
Proctors for Respondent.

463

Exhibit A.

WAR RISK ONLY

BY THE ATLANTIC MUTUAL INSURANCE COMPANY.

23 [No. 94582]

Cargo.

Johnson & Higgins on account of Whom it may concern.

464

In case of loss to be paid in funds current in the United States, or in the city of New York to Union Petroleum Company.

Do make Insurance, and cause to be insured, lost or not lost, at and from Port Arthur, Texas to Rouen, France. On Gasoline in bulk.

Upon all kinds of lawful goods and merchandise, laden or to be laden on board the good Steamer called the Gulflight whereof is master for this present voyage, or whoever else shall go for master in the said vessel, or by whatever other name or names the said vessel, or the master thereof, is or shall be named or called.

465

BEGINNING the adventure upon the said goods and merchandises, from and immediately following the loading thereof on board of the said vessel, at as aforesaid, and so shall continue and endure until the said goods and merchandises shall be safely landed at as aforesaid, AND it shall and may be lawful for the said vessel, in her voyage, to proceed and sail to, touch and stay at, any ports or places, if there unto obliged by stress of weather, or other unavoid

466 able accident, without prejudice to this insurance. The said goods and merchandise hereby insured, are valued (premium included) at $212,000.

TOUCHING the adventures and perils which the said ATLANTIC MUTUAL INSURANCE COMPANY is contented to bear, and takes upon itself in this voyage, they are of the *seas, men-of-war, fires, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, reprisals, takings at sea, arrests, restraints and detainments* 467 *of all kings, princes or people of what nation, condition or quality soever, barratry of the master and mariners, and* all other perils, losses and misfortunes, that have or shall come to the hurt, detriment or damage of the said goods and merchandises, or any part thereof. AND in case of any loss or misfortune, it shall be lawful and necessary to and for the assured, factors, servants and assigns, to sue, labor and travel for, in and about the defence, safeguard and recovery of the said goods and merchandises, or any part thereof, without prejudice to this insurance; nor shall the acts of the insured or insurers, in recov- 468 ering, saving and preserving the property insured, in case of disaster, be considered a waiver or an acceptance of an abandonment; to the charges whereof, the said Insurance Company will contribute according to the rate and quantity of the sum herein insured, having been paid the consideration for this insurance, by the assured or assigns, at and after the rate of 2½%.

AND in case of loss, such loss to be paid in thirty days after proof of loss, and proof of interest in the said (the amount of the

469

Note given for the premium, if unpaid, being first deducted), but no partial loss or particular average shall in any case be paid, unless amounting to *five per cent.* PROVIDED ALWAYS, and it is hereby further agreed, That if the said assured shall have made any other assurance upon the premises aforesaid, prior in day of date to this policy, then the said ATLANTIC MUTUAL INSURANCE COMPANY shall be answerable only for so much as the amount of such prior assurance may be deficient towards fully covering the premises hereby assured; and the said ATLANTIC MUTUAL IN- 470
SURANCE COMPANY shall return the premium upon so much of the sum by them assured, as they shall be by such prior assurance exonerated from. AND in case of any insurance upon the said premises, subsequent in day of date to this policy, the said ATLANTIC MUTUAL INSURANCE COMPANY shall nevertheless be answerable for the full extent of the sum by them subscribed hereto, without right to claim contribution from such subsequent assurers, and shall accordingly be entitled to retain the premium by them received, in the same manner as if no such subsequent assurance
had been made. Other insurance upon the premi- 471
ses aforesaid, of date the same day as this policy, shall be deemed simultaneous herewith; and the said ATLANTIC MUTUAL INSURANCE COMPANY shall not be liable for more than a ratable contribution in the proportion of the sum by them insured to the aggregate of such simultaneous insurance. IT IS ALSO AGREED, that the property be warranted by the assured free from any charge, damage or loss, which may arise in consequence of a seizure or detention, for or on account of any illicit or prohibited trade, or any trade in articles contraband of war.

472 Warranted not to abandon in case of capture, seizure, or detention, until after condemnation of the property insured; nor until ninety days after notice of said condemnation is given to this Company. Also warranted not to abandon in case of blockade, and free from any expense in consequence of capture, seizure, detention or blockade; but in the event of blockade, to be at liberty to proceed to an open port and there end the voyage.

473 IN WITNESS WHEREOF, the President or Vice-President of the said ATLANTIC MUTUAL INSURANCE COMPANY hath hereunto, subscribed his name, and the sum insured, and caused the same to be attested by their Secretary, in New York, the 2nd day of April one thousand nine hundred and fifteen.

474 MEMORANDUM. It is also agreed, that bar, bundle, rod, hoop and sheet iron, wire of all kinds, tin plates, steel, madder, sumac, wicker-ware and willow (manufactured or otherwise), salt, grain of all kinds, tobacco, indian meal, fruits (whether preserved or otherwise), cheese, dry fish, hay, vegetables and roots, rags, hempen yarn, bags, cotton bagging, and other articles used for bags or bagging, pleasure carriages, household furniture, skins and hides, musical instruments, looking-glasses, and all other articles that are perishable in their own nature, are warranted by the assured free from average, unless general; hemp, tobacco stems, matting and cassia, except in boxes, free from average under *twenty per cent.* unless general; and sugar, flax, flax-seed and bread, are warranted by the assured free from average under *seven per cent.* unless general; and coffee in bags

475

or bulk, pepper in bags or bulk, and rice, free from average under *ten per cent.*, unless general.

Warranted by the insured free from damage or injury, from dampness, change of flavor, or being spotted, discolored, musty or mouldy, except caused by actual contact of sea water with the articles damaged, occasioned by sea perils. In case of partial loss by sea damage to dry goods, cutlery or other hardware, the loss shall be ascertained by a separation and sale of the portion only of the contents of the packages so damaged, and not otherwise; and the same practice shall obtain as to all 476
other merchandise as far as practicable. Not liable for leakage on molasses or other liquids, unless occasioned by stranding or collision with another vessel.

If the voyage aforesaid shall have been begun and shall have terminated before the date of the policy, then there shall be no return of premium on account of such termination of the voyage.

In all cases of return of premium, in whole or in part, *one-half per cent.*, upon the sum insured, is to be retained by the assurers.

$27,690 Twenty seven thousand, six hundred 477
ninety Dollars.

Sum Insured, $27,690. Premium $692.25.

(Clause printed in margin.)

Warranted by the assured not to be loaded in excess of her registered tonnage with either lead, marble, stone, coal or iron; also warranted not to be loaded with lime under deck; and if loading with grain warranted to be loaded under the inspection of the Surveyor of the Board of Underwriters,

478 and his certificate as to the proper loading and seaworthiness obtained.

(Clause Rubber Stamped in margin.)

But only against the risk of capture, seizure, or destruction by men-of-war, by letters of mart, by taking at sea, arrests, restraints and detainments of kings, princes and people, authorized by, and in prosecution of hostilities between belligerent nations.

It is understood the Property is or may be in-
479 sured against marine perils, and that the risks embraced in such insurance are not to be covered by this.

Free of claim in case the vessel be missing, and no person saved to prove loss.

The amount insured is not to exceed the cost more than ten per cent.

Commissioner's Report.

UNITED STATES DISTRICT COURT,
480 SOUTHERN DISTRICT OF NEW YORK.

GULF REFINING COMPANY,
Libellant,
against
ATLANTIC MUTUAL INSURANCE COMPANY,
Respondent.

This is a suit by the Gulf Refining Company to recover from the Atlantic Mutual Insurance Com-

pany, an insurer of cargo, a general average contribution which the libellant was obliged to pay in consequence of the torpedoing of the vessel on which the cargo was laden. Pursuant to the order of this Court dated March 28, 1925, referring the case to me as Commissioner to hear and determine the law and the facts, I submit this report. 481

Kirlin, Woolsey, Campbell, Hickox & Keating (Ira A. Campbell and Roger B. Siddall, of counsel), for libellant.

Carter, Ledyard & Milburn (J. M. Richardson Lyeth and Kenneth C. Johnson, of counsel) for respondent. 482

The libellant is the successor in interest in a cargo of gasoline shipped on board the steamship "Gulflight" at Port Arthur, Texas, in April, 1915, bound for Rouen, France. The bills of lading provided that general average should be payable according to the York-Antwerp Rules, 1890, Rule 17 of which provides that "the contribution to a general average shall be made upon the actual values of the property at the termination of the adventure." On April 2, 1915, the respondent (one of several underwriters) issued a policy of war risk insurance on the cargo for the voyage mentioned, insuring the owner thereof in the sum of $27,690. The cargo was valued in the policy at $212,000. On May 1, while proceeding on her voyage, the "Gulflight" was torpedoed by a German submarine a short distance off the Scilly Islands. The vessel was seriously damaged. For the safety of all interests she was towed to the Scilly Islands, where temporary repairs were made. Some of her cargo was sold there. On June 9 she resumed her voyage under convoy with the balance of her cargo and arrived at Rouen on June 13. Certain extraordinary 483

484 expenses and sacrifices of a general average nature were necessarily incurred by the shipowner and other persons for the common benefit and safety of the interests involved in ship, cargo and pending freight. Accordingly, Messrs. Johnson & Higgins, of New York, were employed to draw up a statement and apportionment of the general and particular average losses and expenses aforesaid. The statement prepared by Messrs. Johnson & Higgins, dated February 24, 1916, shows that the total general average charges incurred amounted to $129,-
485 225.43. The contributory values were as follows: Contributing values:

Vessel	$590,000.00	
Add amount made good	569.45	$590,569.
Freight at risk	68,741.33	
Less wages and port charges	2,102.96	
Add amount made good	23,845.41	90,484.
Cargo	312,866.02	
Add amount made good	104,311.62	417,178.
Total contributory values		$1,098,231.00

486 The proportion of general average was, therefore, 129,225.43/1,098,231 or 11.76669%. The general average contribution found due from the cargo was 11.76669% of $417,178.00 or $49,088.04. This general average contribution was paid by the libellant as of February 24, 1916, and the amount made good to cargo, $104,311.62, was received by the libellant as of February 24, 1916. This represents the value of cargo sacrificed computed at the same market price that was used in computing the value of the cargo actually landed at Rouen. The in-

487

sured value of the cargo was $212,000 as compared with the contributory value of $417,178. The respondent insured $27,690.

The libellant claims that inasmuch as the respondent insured 27,690/212,000 of the cargo risk, respondent is liable for that proportion of the general average assessed against the cargo, viz., 27,690/212,000 of $49,088.04 or $6,411.54.

The respondent's contention is that it is liable only for that portion of the contribution which the insured value bears to the contributing value, viz., 27,690/212,000 × 212,000/417,178 or 27,690/417,- 488
178 of $49,088.04 which amounts to $3,258.25. The latter sum has been paid by the respondent. The libellant claims the remainder of the sum of $6,-411.54 or $3,153.29. The sole issue, therefore, is whether an underwriter on cargo under a valued policy, where the contributory value in general average exceeds the insured value, is liable for the whole general average contribution (within, of course, the amount of the subscription), or only for that proportion which the insured value bears to the contributory value.

A general average loss is a loss arising out of 489
extraordinary sacrifices or expenses made or incurred for the preservation of ship and cargo. The plainest principles of equity require that such sacrifices and expenses should be made good by a general contribution from all those benefitted, in proportion to the value of the property which such sacrifices and expenses have been instrumental in saving. This sum is ascertained in most cases directly after the ship's arrival at her port of destination, and is there assessed upon each of the co-adventurers, who are in law primarily liable to the party who has suffered by the loss. The owner of

490 the property sacrificed is, if insured, reimbursed by his underwriters in respect of his loss. The latter then become by subrogation entitled to claim against the owners of the interests saved, who, in their turn, are, if insured, entitled to claim from their underwriters the same proportion of the sum insured in the policy that the amount assessed upon them by way of constribution bears to the whole value of their property saved by the sacrifice. In practice, therefore, whenever ship and cargo are insured, general average losses, when ascertained, are
491 settled by the underwriters.

A marine policy of insurance insures direct loss (partial or total) and general average. The liability for direct loss is an express undertaking. But the underwriter is not a party to an adjustment of general average, and is not directly liable to contribute. The obligation of the underwriter to pay general average is an implied condition of the contract of marine insurance, corresponding to the similar liability implied by the maritime law in every bailment of goods shipped for carriage by sea. Accordingly, the liability of the shipowner and
492 merchant to contribute in, and of the underwriter to pay, general average, must be determined on the same general principles. The underwriter, like the assured, having been saved a direct loss to the insured property by the vicarious sacrifice of other property, is equitably required to contribute to the loss according to its interest.

A further result of the analogy above mentioned is that the mode of adjustment which is proper in regard to the owner of ship and cargo must be proper in regard to the underwriter. Thus, the rule is established that general average shall be adjusted in conformity with the law of the port of

493

destination; that is where the adventure ends and vessel and cargo separate. Hence, underwriters who have undertaken to indemnify the parties to the contract of affreightment are equally bound. It would obviously be inequitable if the owners of the property were required to contribute on one principle and their underwriters on another when the liability of each results from the application, in the former case directly, and in the latter indirectly, of the same rule of maritime law.

Where there has been a general average damage to goods, as, for instance, by water in order to 494
extinguish fire, the underwriter on the damaged goods is liable for a direct partial loss of insured property, and the loss is ascertained, as in case of any direct partial loss on goods, by ascertaining the percentage of loss based on values at destination, and applying such percentage to the policy value, or prime cost if unvalued, in order to eliminate speculative values at destination as the basis of loss. In case of general average damage to a ship the loss is recoverable as a *direct* loss in full up to the sum insured. The underwriter having paid any such general average loss as a direct loss 495
is subrogated to the right of contribution in general average from the other interests. But a general average loss, for the purpose of such contribution, being based upon values at destination, and contributory values frequently differing from insured values, the contribution recoverable by the underwriter on the sacrificed interest may differ from the amount of the direct loss paid. Hence, the question arises whether the fact that the property is valued in the policy at less than the contributory value on which the general average is calculated, reduces proportionately the obligation of the underwriter to pay such contribution.

496 There is nothing in the policy that favors one construction over the other, each being equally consistent with the language of the instrument, Phillips, Insurance, Section 1410. Nor is a solution of the problem advanced by reference to the recognized rule of marine insurance to the effect that the policy value may not be "opened." Whatever course be followed, each party claims, with as much or as little reality, that the other opens the value. *Steamship Balmoral Co.* v. *Marten* (1902), A. C., 511, 512, 513; *International Navigation Co.* v. *Atlantic Mu*
497 *tual Insurance Co.*, 100 Fed., 304, 316. Phillips' conclusion is that the question must depend upon the application of "the general principles of insurance." But, as Lord Macnaghten said in *Steamship Balmoral Co.* v. *Marten* (1904), 511, 513:

> "I do not think one gets rid of the difficulty by referring it to the general principles of insurance. It seems to me that there is as much to be said on the one side as on the other."

498 English law on this issue was settled in 1902 by the decision of the House of Lords in *Steamship Balmoral Co.* v. *Marten*, *supra*. There, in a case of salvage, the value of the vessel exceeded the policy valuation; and it was held that the underwriters were liable only for that proportion of the salvage and general average losses which the policy value bore to the proved value. But the decision was expressly based upon a long established custom. It is true that the usage is defended upon principle, but as simple and convenient rather than as logical. For it was recognized that this method of calculation was rather too favorable to under-

writers. If the theory were applied logically, the sum recoverable would be that which would be payable if the agreed value in the policy had been employed in the average adjustment. 499

Four years later the English usage received statutory recognition in Section 73, sub-section 1 of the Marine Insurance Act, 1906:

> "Subject to any express provision in the policy, when the assured has paid, or is liable for, any general average contribution, the measure of indemnity is the full amount of such contribution, if the subject matter liable to contribution is insured for its full contributory value; but if such subject matter be not insured for its full contributory value, or if only part of it be insured, the indemnity payable by the insurer must be reduced in proportion to the under insurance." 500

In this country the usage for a period of more than two generations, according to text writers and judges, was contrary to English usage. As early as 1834, Phillips, in his Treatise on the Law of Insurance, citing the 1824 edition of Benecke, states 501 the rule to be that whether insurance be made in an open or valued policy, the underwriters are liable to reimburse general averages only to the extent of the value in the policy (Vol. 2, pp. 253, 254). But, he adds,

> "the practice is different in New York, where, under a valued policy, in which the whole value as fixed in the policy is insured, the underwriters contribute the whole amount assessed upon the subject in general average, whether it con-

502 tributes on a value greater or less than at which it is fixed in the policy, and so proportionately, if one-half, one-quarter or any other proportion of the valuation is insured" (p. 254).

This statement is repeated by Judge Addison Brown in International Navigation Co. v. Atlantic Mutual Insurance Co., 100 Fed., 304 (1900); by Judge Thomas in International Navigation Co. v. Sea Insurance Co., 124 Fed., 93 (1903), and by the
503 Circuit Court of Appeals for this circuit on appeal, 129 Fed., 13 (1904).

Much testimony was taken at the hearing bearing upon custom or usage in this respect in New York in 1915 and 1916. Its effect was, however, negative. No settled custom or usage was proved. It appeared that adjusters commonly based general average contributions upon contributory values, without regard to policy values. But underwriters did not always pay contributions thus ascertained; if they did, they collected from their assured the difference between the contributory and policy value. After the decision of the Maldonado
504 case in 1910, refusals on the part of underwriters to pay on the basis of the full contributory value were less frequent; and the effort to collect the excess over the policy value from the assured seems to have been quite generally abandoned. But some underwriters, noticeably the respondent, continued to refuse payment on the basis of full contribution. The failure during all these years to bring the issue before the courts for adjudication is due to the fact that the amounts involved have been too small to justify litigation.

On principle it seems to me that where general average is payable by the assured in respect of a

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loss covered by the policy, the amount which the assured has been obliged to pay is the amount which he ought to recover in order to give the assured the indemnity which the policy is intended to afford him. Apart from the question of policy valuation, the liability of the underwriter is to reimburse the assured in respect of the latter's liability for general average contribution; and the underwriter is concluded by such liability as lawfully established between the respective interests under the contract of affreightment. It is to be presumed that both the underwriter and the assured are familiar with 506
the business in respect to which they contract. It is well known to both parties that the assured may be required to pay general averages with respect to losses insured against. They know that these averages may be adjusted abroad, and that the values will be fixed at destination. Moreover, in case of salvage, an entirely new element enters into the computation of the property saved, viz., the risks and dangers encountered by the salvors. Accordingly, it is now established law that the underwriter is bound by an adjustment properly made in a foreign port in accordance with the foreign 507
law, although both the contributory interests and the sum to be contributed may be based upon principles different from those which prevail at the place where the contract of insurance is made. *Strong* v. *New York Insurance Co.*, 11 Johns (N. Y.), 320; *Lorning* v. *Neptune Insurance Co.*, 20 Pick. (Mass.), 411; *Peters* v. *Warren Insurance Co.*, 1 Story, 463. As Judge Story said in the latter case:

> "The contract of insurance is a contract of indemnity against risks and losses by the perils

508 insured against, not only in the home port and on the ocean, but also in foreign ports. It naturally, therefore, looks to general averages, which may be incurred and enforced abroad as well as at home. If by a peril insured against the insured is compelled in a foreign port by the local law, to pay a sum as general average, which by the law of his own country would not be so, why may not such a loss or charge be properly deemed a general average in the sense of the policy? * * * There is noth-
509 ing unreasonable in construing the engagement of the underwriters in a policy to be that they will pay whatever the insured is compelled to pay as a general average arising from the risks insured against."

The same analogies apply to the issued involved here. Inasmuch as the adjustment of general average is necessarily made independently of the insurance and of insurance values; and in view of the fact that no independent statement of general average as between insurer and insured is contemplated, but the general average contribution intended is
510 that for which the assured may become bound—the reasonable inference, in the absence of any express provision to the contrary, is that the policy valuation was not intended to apply to the adjustment of general average contributions. Since the indemnity claimed by the libellant has not been excluded by any express provision of the policy, it is a reasonable presumption that such exclusion was not intended.

It is not without significance that by the sue and labor clause in the policy in suit the insurer expressly agrees to contribute to such charges

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"according to the rate and quantity of the said sum insured." Unless the same certain standard shall also apply to salvage sacrifices made for the common benefit, an apportionment of salvage might be on a ratio of the sum insured as to part of the burden and on a ratio of value on another part.

The foregoing considerations apply to cargo, with which alone this issue is concerned. Cargo is habitually insured at prime cost, or invoice value. It is true that cargo is generally moving to a place of supposed higher value as the object of the transportation. But in normal times the margin of 512
profit is readily approximated. In time of war or other commercial disturbance the measure of risk may not be so easily ascertained. In either event, however, the underwriter is in a position to adjust the premium in accordance with the risk. With respect to a large volume of international trade, ownership of goods follows the documents lodged with banks. It is certainly contrary to the policy of the law that any undetermined liability should attach to such ownership. Whether a different rule should be applied to a ship is another matter. While a ship is ordinarily a mere vehicle, not an 513
object of trade, and would naturally be assumed to depreciate rather than increase in value on a voyage, the frequent undervaluation of vessels in insurance policies presents a problem which will require serious consideration when the issue arises.

Whatever the reasoning by which it is reached, the foregoing conclusion is established by authority in this jurisdiction.

The beginning of the doctrine may be found in the case of *Leavenworth* v. *Delafield*, 1 Caines' Cases, 574, 578 (1804), where, in a case of capture and subsequent release after abandonment, the Su-

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preme Court of New York required the underwriters on the vessel to pay "the whole of the contribution which shall belong to her."

The issue was squarely decided in *Hotchkiss* v. *Commercial Mutual Insurance Co.*, 1 Robertson (N. Y.), 489, 499 (1863); reversed 48 N. Y., 656 (1871), after argument by Mr. Evarts and Mr. Lord. A shipment of seven hundred barrels of apples to England had been valued at three dollars a barrel, or $2,100. A sea peril led to a jettison of 476 barrels, for which in a general average adjustment at Liverpool the insured was credited with $273.70. The remaining apples on board were also damaged by the sea water entering through the hatches. The plaintiff had a verdict in the Superior Court for the value of the 476 barrels jettisoned, $1,428, and the damage to the other apples, $448, a total of $1,876. The General Term, relying upon *Clark* v. *United Fire & Marine Insurance Co.*, supra, set this verdict aside and gave the plaintiff judgment for only £2.10.6. The court said:

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> "The rule seems to be that where the contributory value exceeds the insured value, whatever is paid in such a case in contribution by the excess of the contributory value over the value in the policy, is paid by the assured. On this proposition, he is his own insurer. For whatever is paid on a contributory value not exceeding the value in the policy, the insured is indemnified on the proportion insured (2 Arnould, 950, §10; Clark v. United Fire & Marine Insurance Co., 7 Mass., 365). This rule applied to the facts of this case entitles the plaintiff to a verdict of £2.10.5, or what-

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ever the sum is which he paid in general average contribution." 1 Robertson, 500.

On appeal the Commission of Appeals reversed the judgment of the General Term, and directed judgment for the plaintiff on the verdict of $2,144, less $273.70 general average received, 48 N. Y., 656. Although there was no opinion by the Commission of Appeals, the final disposition of case determines the principle. It also involves the repudiation by the highest judicial tribunal of this state of the decision of the Supreme Court of Massachusetts in 518
Clark v. *United Fire & Marine Insurance Co.*, 7 Mass., 365 (1811), on which the General Term relied.

The later case of *Providence & Stonington Steamship Co.* v. *Phoenix Insurance Co.*, 89 N. Y., 559, involved only the recovery as a direct partial loss, of salvage expenses on the insured vessel. Although there had been a general average adjustment, it was not involved; and the insured were allowed to recover the expenses in full as a direct loss, leaving the underwriters to enforce by subrogation the general average contributions from the other interests. 519

In *International Navigation Co.* v. *Atlantic Mutual Insurance Co.*, 100 Fed., 304 (1900); affirmed on opinion below, 108 Fed., 987, commonly known as the St. Paul case, the question arose in this court. That was a suit for the recovery, as a direct partial loss, of salvage expenses incurred by a vessel. The vessel, worth $2,100,000 and insured for $1,250,000 in a number of policies in which she was valued at the latter sum, was damaged by stranding to the amount of $107,368. Necessary salvage expenditures as adjudged in two

520 salvage suits and paid by the shipowner amounted to $135,937. Legal expenses were $5,071. At the hearing it was admitted that all the above items had been paid by the libellant on account of the stranding, and that all except the damage to the hull would be proper subjects of a general average adjustment, had such an adjustment been made.

The relevant portion of Judge Addison Brown's opinion follows:

> "It is further urged that the amount ad-
> 521 judged to the salvors in the libel against the ship and freight, was based on a valuation of the steamer of $2,000,000, and that as the policy valuation is only about two-thirds of that sum, the claim for indemnity on account of that item against the insurers should be reduced in the same proportion; since that would be done, it is said, in a direct suit against the insurers to recover average contributions paid by the assured. If in such a suit that rule would apply to the New York practice in general average, I see no reason why it should not be adopted in the present cases. For al-
> 522 though a judicial award against the ship stands pro tanto in lieu of an average adjustment, and so far as it goes, and in the absence of any reservation, binds both the defendants and the libelant as to the amount to be allowed for the salvage services and also as to the division thereof between cargo, ship and freight, it is not conclusive as to the share that any or all of the insurers should pay of the amount adjudged in the salvage suit. No such issue was involved in that suit, and none such could have been introduced into it.

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The rule on this point in England and in Massachusetts appears to be as the defendants contend. If the policy value of the ship is less than her contributory value adopted in the average adjustment, the same proportionate rebate is made upon the average assessment against the ship when indemnity is sought against the insurer, unless otherwise provided in the policies. 2 Phil. Ins., §§1410, 1479; 2 Arn. Ins. (6th Ed.), p. 916; Tyser, Ins., §239; McArthur, Ins., 72; Gow, Ins., 307; Clark v. Insurance Co., 7 Mass., 365. The rule on this 524
subject, however, as on so many other points in general average, is not uniform. Phillips expressly states (Phil. Ins., §§1410, 1479) that the rule in New York is otherwise. • • •

In my view, the New York rule is most consonant with the terms of valued policies and with the object of a valuation, which is to limit both parties on the question of value. *Insurance Co.* v. *Hodgson*, 6 Cranch, 206, 220. 3 L. Ed., 200. When the value has been fixed by agreement, the owner should not be compelled to stand constructive insurer (in a 525
settlement between himself and his actual insurers) of any uninsured value of his ship beyond the amount agreed on in the policy. Yet that is the precise effect of the English and Boston rule. In case of total loss, or of partial loss and repair, the owner is held estopped from claiming beyond the agreed value. The estoppel ought to be mutual (3 Kent, Comm., 273); and the insurer who has agreed to a fixed value of the ship, ought not to be allowed, in case of a loss within the policy, to reject the valuation and to reduce

526 the claim upon him on the mere ground that the vessel is worth more than the sum agreed upon, and that the owner should stand constructive insurer as to the excess, and bear, with the actual insurers, a pro rata share of the loss. Such a rule is unequal and unjust, since it enforces the valuation as against the owner, but ignores it as against the insurer. If there would be some equity in favor of that rule where the undervaluation was unknown or concealed, there would seem to be none, 527 where, as in the present case, there can be no doubt that the undervaluation was known to the insurers, accepted by them as the basis of the contract, with presumably an increased rate of premium proportionate to any increase of risk incidental to the undervaluation (pp. 315-16)."

The stranding of the St. Paul gave rise to another suit, International Navigation Co. v. Sea Insurance Co., 124 Fed., 93, in which the respondent was a British underwriter. Judge Thomas in the District Court for the Eastern District of New 528 York, said:

"The question is whether an English insurance policy on a vessel should bear the expenses arising from stranding in the ratio of the loss to the actual value, which is the English rule (Balmoral Company, Ltd. v. Marten, 2 Q. B. [1900], 748, affirmed in Court of Appeal, L. R., 2 K. B. [1901], 896, affirmed in House of Lords, L. R. App. Cases [1902], 511), or in the ratio of the loss to the policy value, according to the rule at New York, the port of

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discharge (International Navigation Company v. Atlantic Mutual Ins. Company [D. C.], 100 Fed., 304, affirmed in 108 Fed., 987, 48 C. C. A., 181). * * * The present policy states that 'the said steamship, for so much as concerns the assured and the assurers in this policy, is and shall be valued at £275,000.' This stipulation and other provision of the policy plainly state an agreement that of itself necessitates the application of the New York rule stated above. But assuming that the policy is not, by such language, excluded from the English law, there 530
is a further provision that determines the applicability of the law of New York. * * * The provision is that 'general average, salvage, and special charges, as per foreign custom' (that is, ascertained pursuant to foreign custom) shall be paid 'according to foreign statements * * * or per (according to) rules of port of discharge.' The provision is not only for adjusting losses according to foreign custom, but also for payment of losses by the insurer according to the rules of the port of discharge. The dominant rule at the port of New York, the
port of discharge, is the law, and that law is 531
that the insurer under a valued policy shall pay in the ratio of the loss to the stipulated value. The adjusters in the present instance have not only followed the custom of the port in so stating and distributing the loss to the policies, and appointing the amount that each policy should bear, but have in doing this observed the law of the port to which all custom and rules are amenable (pp. 93, 94)."

On appeal the Circuit Court of Appeals for this Circuit affirmed (129 Fed., 13):

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> "The question in dispute is whether, under a valued policy, where salvage has been awarded on a higher valuation, the insured can recover ratably from the several underwriters the salvage he has had to pay, or only such part of it as is in the same proportion to the whole salvage paid as the total policy valuation is to the valuation on which salvage was awarded. • • • The respondent's method of calculation is in accord with English law. The libellant's is in accord with American law (p.
533 14)."

As a British contract, it would ordinarily be interpreted according to British law; but the foreign custom clause made the law of New York applicable. Without some such clause, the court said:

> "the assured on a valued policy was liable to pay in some foreign port general average charges at one rate and when he came to his underwriter for indemnity would be paid at a different rate, receiving less than he had paid and not securing complete indemnity. The
534 same rule applied to claims for salvage loss as to claims for general average loss. Steamship Balmoral Company v. Marten, L. R. App. Cases (1902) 511, (pp. 14, 15)."

The latest and most exhaustive consideration of the issue is *British & Foreign Marine Insurance Co.* v. *Maldanado & Co.*, 182 Fed., 744 (1910). There cargo valued at $48,632 was insured for that amount. A fire at sea led to a general average adjustment, in which the cargo's contributory value was $66,513, and its contribution $22,544. The

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libellant claimed recovery of the whole amount of the general average contribution paid, $22,544, since it did not exceed the amount of the insurance, $48,632. The respondent contended that it was liable for a proportion only of the contribution, namely, such proportion of $22,544 as the insurance and policy value of $48,632 have to the contributory value of the cargo, $66,513. The Circuit Court of Appeals for the Ninth Circuit held that the respondent was liable for full indemnity under Section 2744 of the Civil Code of California, which provides:

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> "A marine insurer is liable for a loss falling upon the insured, through a contribution in respect of the thing insured, required to be made by him towards a general average loss called for by a peril insured against."

But the court further found that this provision was taken from the proposed Code of Civil Procedure of New York, 1865, Section 1511, as the embodiment of the law of New York, which it supported on principle.

My conclusion is that where the contributory value of cargo in general average exceeds its insured value, the underwriter is bound by the contributory value. Accordingly, the libellant is entitled to a decree for $3,153.29, with interest. 537

Respectfully submitted,

VAN VECHTEN VEEDER,
Commissioner.

June 28, 1927.

538 **Exceptions to Commissioner's Report.**

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

GULF REFINING COMPANY,
Libelant,
against
ATLANTIC MUTUAL INSURANCE COMPANY,
539 Respondent.

The respondent hereby excepts to the report of Van Vechten Veeder as Commissioner made herein and filed on or about the 28th day of June, 1927, for the following causes:

1. Because the said Commissioner in his report failed to find that there was a custom in New York that underwriters on cargo should pay that proportion of General Average charges which the insured value bears to the contributory value of the
540 cargo insured.

2. Because the said Commissioner in his report found that the respondent was obliged to pay the proportion of the entire general average charges which the amount insured by it bore to the insured value of the cargo.

3. Because the said Commissioner in his report failed to find that respondent was obliged to pay General Average charges on the portion, covered by it, of the insured value of the cargo only in the

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proportion that the entire insured value bore to the contributory value of the cargo.

4. Because the said Commissioner in his report found that the libelant was entitled to recover of the respondent the sum of Three thousand one hundred fifty-three and 29/100 Dollars ($3,153.29) with interest.

5. Because the said Commissioner failed to dismiss the libel.

June 30, 1927. 542

CARTER, LEDYARD & MILBURN,
Proctors for Respondent,
54 Wall Street,
New York City.

Memorandum of Court Overruling Exceptions and Confirming Report.

The respondent's exceptions to the Commissioner's report are overruled and the report is confirmed. 543

The libelant may have a decree for $3,153.29 with interest from 2/24/16 with costs.

HENRY W. GODDARD,
U. S. D. J.

December 28, 1927.

544 **Final Decree.**

At a Stated Term of the United States District Court, held in and for the Southern District of New York, at the Post Office Building, Borough of Manhattan, City of New York, on the 3rd day of January, 1928.

Present—Honorable HENRY W. GODDARD,
District Judge.

545

GULF REFINING COMPANY, Libelant, against ATLANTIC MUTUAL INSURANCE COMPANY, Respondent.	Final Decree, 64 82.

An order having been entered herein on March 28, 1925, referring this cause to Van Vechten Veeder, Esq., as Commissioner of this court, to
546 hear evidence, argument of counsel and to report to this court his findings of law and fact, and the amount, if any, due in this litigation, and file his report subject to the provisions of Admiralty Rule 27 of this court, together with the evidence taken, and the parties having submitted their evidence, and by their counsel having argued said cause before said Commissioner, and the Commissioner having filed his report on or about June 28, 1927, together with the evidence submitted, and found that the libelant was entitled to a decree for $3,153.29, with interest, and the exceptions thereto filed by the respondent having been duly argued by counsel

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for the respective parties, and the court having filed its memorandum in writing overruling said exceptions and confirming the said report, and the costs of the libelant having been duly taxed at the sum of $578.35,

Now, on motion of Kirlin, Woolsey, Campbell, Hickox & Keating, proctors for the libelant, it is

ORDERED that the exceptions of the respondent to the Commissioner's report herein be, and they hereby are, in all respects overruled, and said report be, and it hereby is, in all respects confirmed; and it is further

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ORDERED, ADJUDGED AND DECREED that the libelant, Gulf Refining Company, recover of and from the respondent, Atlantic Mutual Insurance Company and its stipulators, the sum of $3,153.29, with interest from February 24, 1916, to the date of entry of this decree, amounting to the sum of $2,243.93, together with the sum of $578.35, its costs as taxed, amounting in all to the sum of $5,975.57, with interest thereon until paid; and that the said libellant have judgment and execution therefor; and it is further

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ORDERED that unless this decree be satisfied, or an appeal be taken therefrom within ten days after service of a copy thereof on the proctors for the respondent, execution issue against the respondent and its stipulators, their goods, chattels, credits and lands, to enforce satisfaction of this decree.

HENRY W. GODDARD,
U. S. D. J.

550 **Notice of Appeal.**

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

GULF REFINING COMPANY,
Libelant,
against
ATLANTIC MUTUAL INSURANCE COMPANY,
Respondent.

551

Sirs:

PLEASE TAKE NOTICE that Atlantic Mutual Insurance Company, the respondent in the above entitled cause, hereby appeals to the United States Circuit Court of Appeals for the Second Circuit from the final decree entered herein on the 3rd day of January, 1928, and from each and every part of said decree.

Dated, New York, N. Y., January 14, 1928.

Yours, etc.,

552 CARTER, LEDYARD & MILBURN,
Proctors for Respondent,
Office & P. O. Address,
54 Wall Street,
Borough of Manhattan,
City of New York.

To

ALEXANDER GILCHRIST, JR.,
Clerk.

KIRLIN, WOOLSEY, CAMPBELL, HICKOX & KEATING, Esqs.,
Proctors for Libelant,
27 William Street,
New York, N. Y.

Assignment of Errors. 553

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

GULF REFINING COMPANY,
Libelant,
against
ATLANTIC MUTUAL INSURANCE COMPANY,
Respondent. 554

The respondent, Atlantic Mutual Insurance Company, hereby assigns error to the proceedings and to the final decree of the District Court entered in the above entitled action on the 3rd day of January, 1928, as follows:

FIRST.—The District Court erred in failing to find that there was a custom in New York that underwriters on cargo should pay that proportion of general average charges which the insured value bears to the contributory value of the cargo insured. 555

SECOND.—The District Court erred in holding that the respondent was obliged to pay the proportion of the entire general average charges which the amount insured by respondent bore to the insured value of the cargo.

THIRD.—The District Court erred in failing to hold that the respondent was obliged to pay general average charges on the portion, covered by it, of the insured value of the cargo only in the proportion

556 that the entire insured value bore to the contributory value of the cargo.

FOURTH.—The District Court erred in failing to hold that the respondent was obliged to pay only a proportion of general average charges on the portion, covered by it, of the insured value of the cargo in the ratio that the entire insured value bore to the contributory value of the cargo.

FIFTH.—The District Court erred in holding that
557 the libelant was entitled to recover of the respondent the sum of $3,153.29 with interest amounting to $2,243.93, together with costs of $578.35, amounting in all to $5,975.58.

SIXTH.—The District Court erred in that it failed to dismiss the libel.

SEVENTH.—The District Court erred in that it overruled the exceptions of the respondent to the Commissioner's report and confirmed said report in all respects.

558 EIGHTH.—The District Court erred in that it failed to sustain the exceptions of the respondent to the Commissioner's report.

CARTER, LEDYARD & MILBURN,
Proctors for Respondent,
Office & P. O. Address,
54 Wall Street,
Borough of Manhattan,
New York City.

Stipulation as to Record. 559

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

GULF REFINING COMPANY,
Libelant-Appellee,
against
ATLANTIC MUTUAL INSURANCE COMPANY,
Respondent-Appellant.

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IT IS HEREBY STIPULATED AND AGREED that the foregoing is a true transcript of the record of the said District Court in the above entitled action as agreed on by the parties.

Dated, New York, N. Y., February 3, 1928.

KIRLIN, WOOLSEY, CAMPBELL, HICKOX & KEATING,
Proctors for Libelant-Appellee.

CARTER, LEDYARD & MILBURN,
Proctors for Respondent-Appellant. 561

562 **Clerk's Certificate.**

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

GULF REFINING COMPANY,
Libelant-Appellee,

against

ATLANTIC MUTUAL INSURANCE COMPANY,
Respondent-Appellant.

563

I, Alex. Gilchrist, Jr., Clerk of the United States District Court for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above entitled action as agreed on by the parties.

IN TESTIMONY WHEREOF, I have caused the seal of the said court to be hereunto affixed at the City of New York, in the Southern District of New
564 York, this 5th day of February, in the year of our Lord one thousand nine hundred and twenty-eight, and of the independence of the United States of America the one hundred and fifty-second.

ALEX. GILCHRIST, JR.,
Clerk.

OPINION OF CIRCUIT COURT OF APPEALS. 565

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

GULF REFINING COMPANY, Appellee,

against

ATLANTIC MUTUAL INSURANCE COMPANY, Appellant

Before L. Hand, Swan, and Augustus N. Hand, Circuit Judges

Appeal by the respondent from a decree in personam 566
upon a marine insurance policy.

The respondent issued a war-risk policy for $27,690. upon the libellant's cargo of gasoline, valued at $212,000. on board the tanker "Gulflight" bound from Port Arthur to Rouen. The "Gulflight" was torpedoed off Bishop's Rock, and put in to the Scillys as a port of refuge. There it was found that she could not make her port with a full cargo, and for this reason a part of the gasoline was sold at a sacrifice. After temporary repairs, she reached Rouen with the remainder.

The sacrifice was treated as a general average loss, and an adjustment made both as to it and as to the other losses. 567
The adjusters took the cargo at a contributing value of $417,000 and fixed the libellant's contribution at $49,000, which it paid. The question is what should be the recovery under the policy. The libellant's position is that it should be that proportion of its contribution which the underwriting bears to the agreed value. The respondent maintains that it should be that portion of what the libellant claims that the agreed value bears to the contributing value.

J. M. R. Lyeth for the appellant.
Ira A. Campbell for the appellee.

L. HAND, Circuit Judge:

This case presents the question whether in the case of a cargo, insured under a valued policy, which has suffered a

568 general average contribution, the insured is co-insurer to the extent that the sound value of the cargo is more than the agreed value. The record does not show whether the cargo was undervalued at the port of landing, or whether on the voyage it increased in value; for this reason we ignore the first possibility, without suggesting that it makes any difference. The issue, as the books repeatedly say, is of no grave consequence, once the rule is settled, for the parties may provide for it by a clause in the policy, but it is tabula rasa, there being no authority controlling upon us, and the practise of underwriters being largely in dispute, at least since the decision of the Ninth Circuit in British etc. Co. v. Maldonado & Co., 182 Fed. Rep. 744.

569 It has been settled law since 1761 that in the case of the partial loss of a valued cargo, the insured is a co-insurer in the event of increase in value, and conversely that in the case of a decrease, he recovers that proportion of the agreed value which his loss bears to the sound value, Lewis v. Rucker, 2 Burr. 1167. This has been generally followed since that time, Johnson v. Shedden, 3 East 581, Turner v. Edwards, 12 East 488, Lawrence v. Ins. Co., 3 Johns. Cas. 217, Forbes v. Mfrs. Ins. Co., 1 Gray 371. It was recognized obiter in London Assurance Co. v. Companhia etc. Co., 187 U. S. 149, 172, and in International Nav. Co. v. Atlantic Mut. Ins. Co., 100 Fed. Rep. 317, 318, affirmed on

570 Judge Brown's opinion in 108 Fed. Rep. 987 (C. C. A. 2). The doctrine seems to us to be in accord with sound principle.

The probability of loss does not vary with the value, the goods being the same, but the greater the value, the greater the risk. In the light of this it is certainly possible to read the insertion into a policy of an agreed value as intended to protect the underwriter against increases or undervaluation in cases of partial losses, where alone the question is important. The issue is whether it must be so understood, or whether it may merely limit the amount of the total recovery. Confessedly to the amount of the agreed value not covered the insured is a co-insurer, just as he is in the case of an open policy to the extent of the uncovered prime cost at the port of lading. But the agreed value merely stands in the stead of prime cost, as Lord Mansfield said in Lewis v. Rucker. In an open policy, however, the loss

is always calculated upon the proportion of prime cost to sound value, Usher *v.* Noble, 12 East 639, Clark *v.* United etc. Co., 7 Mass. 365. Unless the agreed value has the same effect as prime cost pro tanto, the underwriter would therefore be at a disadvantage in a valued policy. Hence an agreed value is more than a mere limit upon the recovery; it assures the underwriter against increases in value, just as it assures the insured against decreases. 571

Such difficulties as have arisen came from the notion that the agreed value is absolute for all purposes, a "mutual estoppel" against both sides. This is true in general, but it is impossible to understand it as meaning that the parties may upon no occasion use any other value. Except in the event of the destruction of part of a mass of fungibles, the insured cannot establish his loss at all save by recourse to sound value. Nobody has therefore ever suggested that he is limited to the agreed value, and the result would be preposterous if he were, because he might be able to show no loss whatever, though he had lost much. Hence he fixes his loss at the difference between sound value and the proceeds from the sale of the damaged goods. There can therefore be no "mutual estoppel"; the insured is not precluded from going outside the agreed value, and the underwriter must also be free to do the same. Only so can he get the benefit of the agreed value, except as a mere limit on the recovery. 572

So far as we can see every consideration which dictates this way of reckoning partial losses likewise applies to general average contributions by cargoes. The libellant, however, argues that such a contribution is different because it is fixed in dollars, and the insured needs no recourse to sound value to establish it. That is true, but only because the sound value has already gone into the computation when the adjustment was made, which is conclusive upon the parties. But that cannot conceal the fact that it has been used, nor does it throw any light upon whether the underwriter's liability should be different. In fact the losses are of the same nature and should be subject to the same rules. The law of the sea makes the interests of all parties to the common venture security for each, so that when one is injured the goods of the rest become bound pro tanto to make good the loss. The lien so 573

574 arising may be foreclosed, the sound goods seized and their proceeds taken, and the loss is spread over all exactly as though each had been directly injured pro tanto. Were the guarantor entitled to a different rule as regards his insurer from that proper between the original sufferer and his, we should have the anomaly of allowing only a partial recovery of so much of a cargo loss as remained unsatisfied after the average contributions had been paid, and of allowing full recovery of so much of a cargo loss as fell upon cargo contributors.

The libellant further argues that the doctrine does not apply equally, because it alleges that, if there has been a decrease in value, the underwriter in cases of general av-
575 erage contributions pays only that proportion which the contribution bears to the agreed value. So far as we know the law has not yet been so settled, and it may never be. The only evidence that it is the custom is of a Belgian underwriter; we cannot find in this record that it is universal. If it is, the contract may indeed be controlled by it, but then only because of the custom. We cannot decide this case on that assumption. Moreover, a custom may operate unequally if it has been accepted, and need not be applied beyond its scope for purposes of consistency. On principle we cannot see why the rule should not apply equally to cases of average contributions as to partial
576 losses. It is true that this would result in making the policy more than indemnity, but again that is the case in partial losses. There is no greater reason to deny it because the insured recovers more than his actual contribution, than because he recovers more than the goods have been actually damaged. In either case the result arises from the contract, and, if the valuation be honest, violates the principle of indemnity no more than is essential if the parties are to be allowed thus in advance to fix their rights.

In general therefore it appears to us that since co-insurance is right in principle, and is admittedly the law as to partial losses, it should apply to general average contributions. We can find nothing to the contrary in the books except British etc. Co. v. Maldonado & Co., 182 Fed. Rep. 774 (C. C. A. 2), and an early New York case, Strong v. Firemens Ins. Co., 11 Johns. 323, in which the chief point discussed was as to the proper place at which the adjust-

ment should be computed. The question of whether when 577
the amount was reached, the underwriter was liable in toto was assumed. Except for the law relating to hulls, we should be reasonably confident that the respondent was right, in spite of our unwillingness to differ with our brothers in the Ninth Circuit.

The decisions touching hulls are however in conflict. In cases of partial hull losses the insured in England recovers in full, regardless of the valuation, Aitchison v. Lohre, L. R. 4 App. Cas. 755, and the law is the same here, International Nav. Co. v. Atl. Mutual Ins. Co., supra. Such cases come up usually when the ship has been repaired, and a repair bill always represents a sum of money fixed without
regard to the ship's value, except for the rule of thumb in 578
cases of old ships that only two-thirds of the bill shall be allowed. Were the insured treated as a co-insurer in such cases the value of the ship would have to be found, and then the proportion which the repairs bore to it. Such values are not ordinarily, (or at least were not when the rule became settled), fixed by a market; they rest upon opinion. There was some practical justification therefore for adopting the easier rule of taking the repairs as the measure of the difference between the ship if staunch and as injured. However, it is interesting to observe that in a case where repairs were not made, but the ship was actually sold, (Pitman v. Universal Marine Insurance Co., L. R. 9
Q. B. D. 192), Lindley, J., held that the doctrine of coin- 579
surance applied. In the Court of Appeal this point was not argued, was apparently abandoned by the underwriter, and the case did not decide it. The ruling is nevertheless important as showing how much considerations of convenience may have determined the law as it stands.

On the other hand in case of general average contribution by the hull the House of Lords in S. S. Balmoral Co. v. Martin, L. R. 1902 (App. Cases) 511, held the insured to be a coinsurer, thus assimilating the law to that governing partial cargo losses. It would therefore seem that if the case arose of average contribution by a cargo the English courts a fortiori would use the same method of reckoning, and indeed this is conceded to be the law and custom in England, France, Germany, Holland and Japan. The Supreme Court of Massachusetts so held in respect of hull

580 contributions in the early case of Clark v. United etc. Co., 7 Mass. 364. We, however, decided the contrary in International Nav. Co. v. Atl. Mut. Ins. Co., supra, and in Int. Nav. Co. v. Sea Ins. Co., 129 Fed Rep. 13, and in this we are in accord with the law of New York. (Providence etc. S. S. Co. v. Phœnix Ins. Co., 89 N. Y. 559).

It would indeed be possible to give as a reason for the English distinction that in the case of general average contributions resort was not necessary to actual valuations. We have already said that this seems to us inadequate, and our own law has at least the merit of consistency in treating all hull losses alike. However, it is true that if practical considerations are all in all something is to be said
581 for the English rule. As much could not be said for one which made a similar distinction as to cargoes. There is no substantial inconvenience in fixing partial cargo losses and no more in fixing general average. Little would be gained in practise, and much, as it seems to us, lost in principle by importing a doctrine applicable to hulls for especial reasons when the companion situation as regards cargoes is the opposite; and we have no reason to suppose that Brown, J. would not have treated all cargo losses alike, as he treated hulls. We agree that complete consistency is impossible. The question is whether we shall leave partial cargo losses the unique exception or group them in one
582 class and hulls in another. The less arbitrary division, and that most consonant with principle, appears to us to be the second.

Decree reversed; libel dismissed.

[Endorsed:] United States Circuit Court of Appeals, Second Circuit. Gulf Refining Co., Appellee, against Atlantic Mutual Ins. Co., Appellant. Opinion, L. Hand, C. J.

DECREE OF REVERSAL AND ORDER FOR MANDATE.

583

UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals in and for the Second Circuit, held at the court rooms, in the Post Office building, in the city of New York, on the 24th day of July, one thousand nine hundred and twenty-eight.

Present: Hon. Learned Hand, Hon. Thomas W. Swan, Hon. Augustus N. Hand, Circuit Judges.

584

GULF REFINING COMPANY, Libellant-Appellee,

v.

ATLANTIC MUTUAL INSURANCE COMPANY, Respondent-Appellant

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be, and it hereby is, reversed with costs and cause remanded with directions to dismiss the libel. 585

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

L. H., T. W. S.

[Endorsed:] United States Circuit Court of Appeals, Second Circuit. Gulf Refining Company *v.* Atlantic Mutual Ins. Co. Order for mandate. United States Circuit Court of Appeals, Second Circuit. Filed Jul. 24, 1928. William Parkin, Clerk.

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CLERK'S CERTIFICATE.

UNITED STATES CIRCUIT COURT OF APPEALS, SOUTHERN DISTRICT OF NEW YORK

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 198, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Gulf Refining Company, Libellant-Appellee, against Atlantic Mutual Insurance Company, Respondent-Appellant, as the same remain of record and on file in my office.

587

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 19th day of September, in the year of our Lord one thousand nine hundred and twenty-eight, and of the Independence of the said United States the one hundred and fifty-third.

Wm. Parkin, Clerk. (Seal United States Circuit Court of Appeals, Second Circuit.)

588

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 26, 1928

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM—1928.

No. .

GULF REFINING COMPANY,
Petitioner,
(Libelant-Appellee below),

against

ATLANTIC MUTUAL INSURANCE COMPANY,
Respondent,
(Respondent-Appellant below).

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States.

Your petitioner, Gulf Refining Company, respectfully shows to the Court as follows:

STATEMENT.

This is a petition for a writ of certiorari to review a decision of the Circuit Court of Appeals for the Second Circuit. A written opinion was handed down (R. 189-194), and the order for mandate was filed on July 24, 1928 (R. 195).

The decree which it is sought to review was entered in a suit in admiralty brought to recover a balance alleged to be due to your petitioner by reason of a general average loss under a policy of marine war risk insurance issued by respondent. The case was brought originally in the District Court for the Southern District of New York. With the consent of the parties, the District Court referred the case to a commissioner to hear and report on all issues. The commissioner held in favor of your petitioner, filing a report (R. 160-179). The District Court confirmed the commissioner's report and entered a final decree in favor of your petitioner (R. 181-183). The Circuit Court of Appeals has reversed the commissioner and the District Court and has decided in favor of respondent.

The Facts.

The facts are essentially undisputed, being almost entirely admitted in the pleadings or by stipulation (R. 2-11, 152-160).

Your petitioner is the successor in interest to the owners of a large cargo of gasolene shipped on April 10, 1915, from Port Arthur, Texas, bound for Rouen, France, on board the Steamship *Gulflight*.

Respondent insurance company issued a policy of war risk insurance covering this cargo for the voyage above mentioned. By this policy, the owners of the cargo were insured in the sum of $27,690, the cargo being valued in the policy at $212,000. In other words, respondent by this policy insured 27690/212000ths, or approximately 1/8th, of the cargo risk.

In the course of the voyage, the *Gulflight* was torpedoed near the Scilly Islands by a German submarine. The damage done by the torpedo was serious, but it did not prove

fatal. After the making of various extraordinary sacrifices and expenditures for the common safety, the voyage was completed and the cargo delivered at Rouen on June 18, 1915.

To make good these extraordinary sacrifices and expenditures made for the common safety, a general average was stated according to law and contributions were assessed against the various interests at risk. The cargo in question was assessed $49,088.04, this being its proper share based on a contributory value of $417,178. The contributory value was the actual value of the cargo saved at the place and time of the termination of the venture. No question is raised as to the propriety of the general average adjustment.

Your petitioner duly paid the general average contribution assessed against the cargo and then asked indemnity from respondent insurance company for the same proportion thereof as respondent's underwriting bore to the agreed policy value, viz., approximately one-eighth.

Respondent, however, refused to indemnify your petitioner to this extent, claiming that as the contributory value exceeded the agreed policy value, it should only pay that portion of the amount claimed by your petitioner which the agreed policy value bore to the contributory value.

Respondent paid and your petitioner received this lesser amount without prejudice. Your petitioner sues herein for the balance.

The Question Involved.

The sole question presented in this case is whether, where cargo, insured under a valued policy, suffers from a peril insured against through being assessed a general average contribution based on a contributory value in ex-

cess of the agreed policy value, the insured should recover complete indemnity from his underwriters, or only partial indemnity in the proportion which the agreed policy value bears to the contributory value.

In a broad sense this question is a question of construction of the contract of insurance. But the policy herein, and cargo insurance policies generally, do not contain any provisions directly applicable. The question, therefore, is one of general importance and must be referred for solution to the general principles, usages and authorities governing the construction of contracts of marine insurance.

Reasons for Granting Writ.

1. The decision herein of the Circuit Court of Appeals for the Second Circuit is directly opposed to the decision of the Circuit Court of Appeals for the Ninth Circuit in the case of *Maldonado & Company* v. *British and Foreign Marine Insurance Company*, 182 Fed. 744 (1910) *certiorari denied*, 220 U. S. 622.

This conflict is specifically recognized by the court in its opinion (R. 192).

The effect of the conflict is aggravated by the fact that the decision in the Ninth Circuit is essentially a decision on New York law. When that case came before that court sitting in California, there were in that jurisdiction no decided cases bearing upon the question. It was, therefore, necessary for the court to inquire into the source of the California law. This the court proceeded to do and came to the conclusion that the California law was based upon the New York law, so far as concerns payment of general average losses by marine underwriters. The decision, therefore, is in effect a decision on New York law.

The conflict between the two decisions is complete.

2. The decision herein of the Circuit Court of Appeals for the Second Circuit is directly opposed to the decision of the Supreme Court of Judicature of the State of New York in *Strong et al.* v. *New York Firemen Insurance Company*, 11 Johnson 323 (1814).

This conflict is also specifically recognized by the court in its opinion (R. 192). It is true that in this New York case the court dismissed defendant underwriters' contention that they were only liable for partial indemnity with few words; nevertheless the report of defendant's argument shows clearly that the court did decide after full argument the precise question herein involved.

New York is the great centre of American marine underwriting, and there has been developed in the local courts a very considerable body of law covering marine insurance transactions. Your petitioner respectfully submits that this Court ought to review the decision herein of the Circuit Court of Appeals which, not only, is not supported by any local decisions, but directly conflicts with the precedent established one hundred and fourteen years ago by the highest court of the state.

3. Although the question as to the amount of recovery on general average losses under marine insurance policies has been the subject of considerable litigation for more than a century, the rationale of the decision sought to be reviewed is unique and out of accord with all pre-existing authority on the subject. The brief submitted herewith will elucidate this point.

4. With the decision sought to be reviewed herein there are now established within the United States three dif-

ferent and conflicting rules governing the recovery of general average losses under policies of marine insurance.

(a) In the Ninth Circuit and in the state courts of New York, the so-called New York or American rule has been established. *Maldonado & Company* v. *British and Foreign Marine Insurance Company*, 182 Fed. 744 (1910), *Certiorari denied*, 220 U. S. 622; *Strong* v. *New York Firemen Insurance Company*, 11 Johnson 323 (1814); *Providence and Stonington Steamship Company* v. *Phoenix Insurance Company*, 89 N. Y. 559 (1882).

(b) In Massachusetts the so-called Boston or English rule has been established. *Clark* v. *United Fire & Marine Insurance Company*, 7 Mass. 364 (1811).

(c) The present decision establishes for the Second Circuit a new rule, half "Boston" and half "New York". The "New York" rule is to be applied to hull insurance, the "Boston" rule to cargo insurance.

The resulting situation is naturally complete confusion.

Your petitioner respectfully submits that an authoritative pronouncement from this Court is vitally necessary to remove the confusion which this case creates, and to establish an orderly practice of settling insurance claims of this character, as well as to throw much needed light on the theory of the law of valued policies.

Wherefore, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Second Circuit commanding said court to certify and send to this Court on a day designated for its review and determination, a full and complete transcript of the record and of all proceedings

in said United States Circuit Court of Appeals had in said cause entitled in that court, *Gulf Refining Company*, Libelant-Appellee v. *Atlantic Mutual Insurance Company*, Respondent-Appellant; to the end that the said cause may be reviewed and determined by this Court as provided by law; that the said judgment of the United States Circuit Court of Appeals for the Second Circuit herein may be reversed; and that your petitioner may have such other and further relief as may be just.

And your petitioner will ever pray, etc.,

GULF REFINING COMPANY,
BY IRA A. CAMPBELL,
Proctor for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES.

GULF REFINING COMPANY,
Petitioner,
(Libelant-Appellee below),

against

ATLANTIC MUTUAL INSURANCE COMPANY,
Respondent,
(Respondent-Appellant below).

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

STATEMENT UNDER RULE 25.

The opinion of the Commissioner appointed by the District Court to hear and report (R. 160-179) is reported only in 1927 Am. Mar. Cas. 1669.

In confirming the Commissioner's report (R. 181) the District Court did not write any opinion.

The opinion of the Circuit Court of Appeals reversing the District Court and the Commissioner (R. 189-194) is reported in 27 Fed. (2d) 678, and 1928 Am. Mar. Cas. 1371.

The decree of reversal and order for mandate of the Circuit Court of Appeals was filed on July 24, 1928 (R. 195).

Jurisdiction of this Court is invoked under the Act of February 13, 1925. See *Hamilton Shoe Company* vs. *Wolf Brothers*, 240 U. S. 251.

The facts are fully stated in the petition, as is also the question involved.

Preface to Argument.

It is not attempted in the petition or in this brief to argue the correctness of the decision sought to be reviewed. We purpose here only to show briefly the legal background of the case and the conflicting decisions on the point involved, to the end that this Court may be advised that its authoritative pronouncement on the question is greatly needed.

I.

Marine Policies.

The policy in question is a war risk policy and the loss (torpedoing) was due to a war risk. The principles involved, however, are precisely the same as would have been involved had the policy covered general marine risks, and had the loss been due to some common marine risk such as a peril of the sea. Counsel have not contended, nor has either of the lower courts suggested, that any distinction in principle is to be made, so far as this case is concerned, between war risk and general marine policies.

Marine insurance is commonly written covering cargoes and covering vessels. The policies covering cargo we call herein "cargo policies", and policies on vessels we call "hull policies".

Most marine insurance is written through valued policies, that is policies in which the value of the thing insured is agreed upon between the insured and the underwriters and such value is stated in the policies. Such agreed value

is, in the absence of fraud or mistake, conclusive. 38 *Corpus Juris* 1123.

One underwriter does not usually cover the whole risk, but only part of it. For example, in the case at bar, the respondent insured $27,690 on the cargo valued at $212,000. For his complete protection, an assured must get enough policies so that the whole of the agreed value is covered. Otherwise he becomes a co-insurer for the uncovered portion of the agreed value and, as such, has himself to bear a portion of each loss.

II.

The Settlement of Particular Average Losses Under Marine Policies.

Particular average is the name applied to any partial loss attributable to a peril insured against and not of a general average nature.

Although the policies may be in identical terms, there is a settled distinction in law and in practice between the settlement of particular average losses on hull policies and on cargo policies. This matter is fully covered in the noted opinion of Judge Addison Brown in *International Navigation Company* v. *Atlantic Mutual Insurance Company*, 100 Fed. 304 (S. D. N. Y. 1900), *affirmed on opinion below*, 108 Fed. 987, *certiorari denied*, 181 U. S. 623, commonly known as the *St. Paul Case*.

The following rules are laid down by Judge Brown:

In case of a particular average loss on a valued hull policy, the underwriters pay the full amount of that particular average loss (not exceeding the amount insured) without any inquiry as to the percentage of loss, or as to whether the actual value of the ship exceeded the insured

value or not. Thus, if the shipowner has his vessel insured for $100,000 valued at $100,000, and she suffers damage from marine perils which requires $20,000 to repair, the underwriters pay the shipowner a loss of $20,000, irrespective of how much the vessel was actually worth or what the percentage of loss might have been.

In case of a particular average loss on a valued cargo policy, however, the underwriters do not pay on the basis of the actual loss to the assured. The *percentage* of loss is ascertained by comparison at destination of damaged value with sound value, and the underwriters pay that percentage of the insured value. Thus, if the cargo owner insures goods for $10,000 valued at $10,000 and the goods come into port damaged to the extent of 40% of their value, the underwriters pay a loss of 40% of $10,000, or $4,000. It may be that the goods were undervalued in the policy, or that their value increased during transit, so that when they arrived they would have been worth $15,000 in sound condition. The cargo owner, therefore, has suffered an actual loss of 40% of $15,000, or $6,000. Nevertheless, the policy value is conclusive, as between the assured and the underwriter, and the assured only collects $4,000. On the other hand, it may be that the goods depreciated in value, and on arrival would have been worth only $7,000 sound. In that case, the cargo owner has suffered an actual loss of only $2,800, but since the policy value is conclusive, he recovers $4,000 from his underwriters.

The reasons for this distinction between payments of particular average losses on hull policies and on cargo policies are considered at length by Judge Brown in the *St. Paul Case* (100 Fed. 323-4). On page 323 he says:

> "In the cases of partial loss, the different rule applied to goods and freight from that applied to

ships, has not arisen from any theoretical or even logical construction of the policy; but from practical considerations, having reference to the different purposes in insuring, the different circumstances of the subjects of insurance and the evident difference in the appropriate measure of indemnity.

"The reason assigned by Lord Mansfield for the rule as respects goods, was in order that the proportion of the insurance chargeable to the insurers on a partial loss, might be the true proportion of the merchant's actual loss by the sea peril, and not fluctuate with the market price or profits, but be the same proportion, whether the goods came to a rising or a falling market. See, also, 2 Arn. Ins. (6th Ed.) pp. 928-933."

III.

General Average Losses.

General average, in its original application as between the parties jointly engaged in a maritime venture, has nothing to do with marine insurance. It is simply an adjustment between the parties to the venture for the purpose of imposing upon all equally an extraordinary loss which one has sustained for the common safety and benefit.

From the standpoint of a cargo owner, a general average contribution is a charge levied upon his cargo because other goods or money has been sacrificed or spent to save the venture as a whole, including his cargo. This contribution constitutes a lien on the cargo which must be paid or secured by the cargo owner before he may take possession.

General average claims under marine insurance policies arise after and subsidiarily to the primary rights between

the parties to the venture. Thus, if the general average charges were caused by or through a peril insured against, then the debt which the goods have incurred by reason of the lien for contribution to these general average charges is a loss which the assured has suffered through a peril insured against and is collectible from his underwriters. 38 *Corpus Juris* 1113.

In the case at bar, the general average charges were caused through the torpedoing of the *Gulflight* by a German submarine. This was a war risk. Respondent's policy on petitioner's goods covered against war risks. Respondent is, therefore, liable to reimburse petitioner for the general average charges assessed against petitioner's goods.

IV.

The Cases Covering Settlement of General Average Losses Under Marine Policies Are in Complete Confusion.

While the practice of settling particular average claims under valued marine policies has long been definitely established, the practice of settling general average claims has, as we shall show, come in this country to a state of complete confusion.

In cases where the actual or contributory value of the thing insured differs from the policy value, three different rules for settlement have been suggested:

(a) *Rule of full indemnity.* Under this rule, the underwriters give the assured complete indemnity (not exceeding the amount insured) without inquiry as to whether the policy value differs from the contributory value.

(b) ***Rule of proportionate indemnity.*** Under this rule the underwriters inquire as to the contributory value. If the contributory value exceeds the insured value, then they only give the assured indemnity in the proportion that the insured value bears to the contributory value. If the insured value is greater than the contributory value, the rule, applied rigorously, would give the assured more than indemnity. No case has ever extended the rule this far, but the possibility is discussed by the Circuit Court of Appeals in its decision in the case at bar (R. 192).

(c) *Full indemnity on hull insurance and proportionate indemnity on cargo insurance.*

This rule is a mixture of the two above, making a distinction between settlements under hull policies and under cargo policies under a supposed analogy to the distinction made in the settlement of particular average losses.

All three of these conflicting rules are supported by decisions in the United States at the present time.

The *rule of full indemnity*, which has been called the New York or American Rule, is established for the Ninth Circuit and for the state courts of New York as to both hull and cargo. *Maldonado & Company* v. *British & Foreign Marine Insurance Company*, 182 Fed. 744 (1910); *certiorari denied* 220 U. S. 622; *Providence & Stonington Steamship Company* v. *Phoenix Insurance Company*, 89 N. Y. 559 (1882); *Strong* v. *New York Firemen Insurance Company*, 11 Johnson 323 (1814).

The *rule of proportionate indemnity* (as applied to cases where the contributory value exceeds the insured value), which has been called the English or Boston Rule, is established as to both hull and cargo for the state courts of Massachusetts and in England by statute. *Clark* v.

United Fire & Marine Insurance Company, 7 Mass. 364; *English Marine Insurance Act of 1906, Sec. 73.*

The decision of the Circuit Court of Appeals in the case at bar now establishes the *mixed rule* for the Second Circuit. That court had already committed itself to the *rule of full indemnity* on hull policies. *International Navigation Company* v. *Atlantic Mutual Insurance Company*, 100 Fed. 304; *affirmed on opinion below*, 108 Fed. 987; *certiorari denied*, 181 U. S. 623; *International Navigation Company* v. *Sea Insurance Company*, 124 Fed. 93; *affirmed* 129 Fed. 13. The present decision would now establish the *rule of proportionate indemnity* as to cargo, thus creating the *mixed rule*. Prior to this decision the *mixed rule* had never, so far as we can find, been applied anywhere.

The decision sought to be reviewed is, in its rationale, unique and without precedent anywhere and specifically conflicts with the rationale of the decisions in the Ninth Circuit, in the highest court of New York, and in the highest court of Massachusetts. Furthermore, the decisions in the Ninth Circuit and New York on the one hand, and in Massachusetts on the other hand, conflict between themselves.

Respectfully submitted,

Ira A. Campbell

Ira A. Campbell,
Proctor for Petitioner.

New York, October 15th, 1928.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928.

No. 506.

GULF REFINING COMPANY,
Petitioner,
(Libelant-Appellee below),

against

ATLANTIC MUTUAL INSURANCE COMPANY,
Respondent.
(Respondent-Appellant below).

BRIEF IN BEHALF OF PETITIONER.

STATEMENT.

This case comes up on writ of certiorari to the Circuit Court of Appeals for the Second Circuit to review a decree reversing a final decree of the District Court for the Southern District of New York entered in libelant's favor in a suit in admiralty brought to recover a general average loss under a policy of marine war risk insurance.

The parties will be described as they were in the District Court.

The opinion of the Commissioner appointed (with the consent of the parties) by the District Court to hear and

report on all issues (R., 160-179) is reported only in 1927 Am. Mar. Cas. 1669.

In confirming the Commissioner's report (R., 181), the District Court did not write any opinion.

The opinion of the Circuit Court of Appeals reversing the District Court and the Commissioner (R., 189-194) is reported in 27 Fed. (2d) 678, and in 1928 Am. Mar. Cas. 1371.

The decree of reversal of the Circuit Court of Appeals was filed on July 24, 1928 (R., 195). Certiorari was granted on November 26, 1928 (R., 197).

Jurisdiction of this court is invoked under the Act of February 13, 1925.

The Facts.

The facts are undisputed (except as to a question of custom, discussed at the end of this section), all of them being admitted in the pleadings or by stipulation (R., 2-11, 152-160).

Libelant is the successor in interest to the owners of a large cargo of gasoline shipped on April 10, 1915, from Port Arthur, Texas, bound for Rouen, France, on board the steamship *Gulflight*. Two bills of lading covering the shipment were duly executed by the carrier and accepted by the shipper, which bills of lading provided that general average should be payable according to the York-Antwerp Rules, 1890.

Respondent insurance company, on April 2, 1915, issued a policy of war risk insurance covering this cargo for the voyage above mentioned. By this policy, the owners of the cargo were insured in the sum of $27,690, the cargo being valued in the policy at $212,000. In other words,

respondent, by this policy, insured 27,690/212,000ths, or approximately one-eighth of the cargo risk. The policy is printed at page 155 of the Record.

On May 1, 1915, while proceeding on said voyage, the *Gulflight* was torpedoed by a German submarine near the Scilly Islands. The damage done by the torpedo was serious, but it did not prove fatal. For the safety of all interests concerned, the vessel was towed to the Scilly Islands, where some of her cargo was sold (the vessel being unable to carry it further with safety), assistance was given, and temporary repairs effected. On June 9th, the *Gulflight* resumed the voyage and, with convoy and assistance, arrived at Rouen on June 13th, and completed the discharge and delivery of the cargo to the consignee on June 18th.

In consequence of the torpedoing, certain extraordinary expenses and sacrifices of general average nature were necessarily incurred by the shipowners and other parties for the common benefit and safety of the interests involved in the ship, cargo and pending freight.

To make good these extraordinary expenses and sacrifices, a general average was stated according to law and contributions were assessed against the various interests at risk, ratably according to their respective values as saved.

The cargo in question was assessed $49,088.04, this being its proper share, based on a contributory value of $417,178. This contributory value was the actual value of the cargo saved and made good in general average as taken at the place and time of the termination of the venture. No question is raised as to the propriety of the general average adjustment.

Libelant duly paid the general average contribution assessed against the cargo and then claimed indemnity from respondent for the same proportion thereof as respondent's underwriting bore to the agreed policy value, viz., 27,690/212,000ths of $49,088.04 which equals $6,411.54.

Respondent, however, refused to indemnify libelant to this extent, claiming that since the contributory value exceeded the agreed policy value it should pay only that proportion of the amount claimed by libelant which the agreed policy value bore to the contributory value, viz., 212,000/417,178ths of $6,411.54, which equals $3,258.25.

Respondent paid and libelant received this lesser amount without prejudice. Libelant sues herein for the balance.

All of the testimony in the record bears only upon an issue of custom which respondent injected into the case by pleading that there was a custom prevailing in New York at the time this contract was made (1915), and that such custom was for underwriters to settle with assureds upon the basis contended for by respondent (R., 10).

Both lower courts have found that no such custom was proved (R., 168 and 190), and we assume that this Court will not wish to review these concurrent findings. However, there cannot be the slightest doubt as to their correctness.

Mr. Eldert, president of *respondent*, testified that after 1910 there was no settled practice in New York; that the practice was confused (R., 27, 28, 73, 74). Surely the respondent cannot impeach the testimony of its own president.

The testimony of libelant's expert witnesses, Davey and Mayhew, as well as the text writers quoted in Point Three of this brief, gives the clearest indication that method of

settlement contended for by libelant has been the predominating method in New York for many, many years.

Further discussion of the testimony and its ramifications (almost entirely immaterial) seems wholly unnecessary. In summary: there were four witnesses called who possibly could be said to be qualified to speak as to any custom prevailing at the time this contract was made (Davey, Eldert, Mayhew, Ullman). All of these but Ullman testified distinctly either that there was no settled custom or that the custom was as libelant, not respondent, contends (R., 27, 28, 73, 74, 87, 92, 111-114).

The Question Involved.

The fact that respondent insured only one-eighth of the cargo risk, instead of all of it, is of no importance to the question here involved. Respondent's share is simply one-eighth of what it would have been had respondent underwritten the entire agreed value. Subject to this qualification respondent's liability is exactly as though it had insured the whole agreed value.

The sole question presented in this case is whether, where cargo, insured under a valued policy, suffers from a peril insured against through being assessed a general average contribution based on a contributory value in excess of the agreed policy value, the assured should recover complete indemnity from his underwriters or only partial indemnity in the proportion which the agreed value bears to the contributory value.

Libelant contends for the principal of full indemnity; respondent seeks the rule of proportionate indemnity.

In a broad sense, this question is a question of construction of the contract of insurance. But the policy herein,

and cargo insurance policies generally, do not contain any provisions directly applicable. The question, therefore, is one of general importance and must be referred for solution to general principles, usages and authorities governing the construction of contracts of marine insurance.

The Decisions Below.

The Commissioner's report, upon which the District Court entered its decree, held in libelant's favor. The reasoning of the Commissioner may be summarized as follows:

It is found from text writers and statements of judges that the usage in this country for a period of more than two generations (except in Massachusetts) has been in accordance with libelant's contention. On principle, libelant's rule is preferable. A policy of insurance is intended to afford indemnity to the assured. As to general average claims, underwriters are bound by adjustments made fairly in foreign ports and under foreign laws. When they take a cargo risk, they know that the cargo may be subjected to general average contributions assessed under laws differing from their own, and assessed upon values differing from the insured values. Since full indemnity for these contributions has not been excluded by any express provision of the policy, it is a reasonable presumption that such exclusion was not intended. With respect to a large volume of international trade, insurance follows documents of title lodged with banks. It is certainly contrary to the policy of law that an undetermined, unprotected liability should attach to the ownership of goods incident to the holding of such documents. Lastly, the Commissioner held that his conclusion was established by the authorities in his jurisdiction.

The Circuit Court of Appeals reversed this decision. In its opinion, it fails to answer the various considerations pointed out by the Commissioner, and bases its holding largely on a conception of co-insurance.

The reasoning of the Circuit Court of Appeals is as follows:

The risk which an underwriter takes is dependent, in part, on value. An agreed value in the policy assures the underwriter against increases in value of the property insured. It is settled that partial losses (particular average) on cargo insurance are settled with underwriters according to the rule of proportion. The considerations which dictated the rule of proportion for partial losses apply likewise to indemnity for general average contributions. In fact, general average losses are of the same nature as particular average losses. The fact that the rule of proportion would give the assured more than indemnity for genera' average contributions where the insured value exceeds the agreed value is not a serious objection. Co-insurance is right in principle, is admittedly the law as to particular average on cargo, and should apply to general average on cargo, even though it has been held otherwise by the Circuit Court of Appeals for the Ninth Circuit and in an early New York case; and even though the established American rule as to hull insurance, except in Massachusetts, is otherwise.

POINT ONE.

The Legal Background.

A. Marine Policies.

The policy in question is a marine war risk policy and the loss (torpedoing) was due to a war risk. The principles involved, however, are precisely the same as would have been involved had the policy covered general marine risks and had the loss been due to some common marine risk such as a peril of the sea. Counsel have not contended, nor has either of the lower courts suggested that any distinction in principle is to be made, so far as this case is concerned, between war risk and general marine policies.

Most marine insurance, whether covering a vessel or cargo, is written through valued policies, that is, policies in which the value of the thing insured is mutually agreed upon between the assured and the underwriters and such value is stated in the policies. Such agreed value is, in the absence of fraud or mistake, conclusive. 38 *Corpus Juris* 1123.

One underwriter does not usually cover the whole risk, but only part of it. For example, in the case at bar, the respondent insured $27,690 on a cargo valued at $212,000. For his complete protection an assured must get enough policies so that the whole of the agreed value is covered. Otherwise, he becomes a co-insurer for the uncovered portion of the agreed value and as such has himself to bear a portion of each loss.

B. The Settlement of Particular Average Losses under Marine Policies.

Particular average is the name applied to any partial loss attributable to a peril insured against and not of a general average nature.

Although the policies may be in identical terms, there is a settled distinction in law and in practice between the settlement of particular average losses under hull policies and under cargo policies. This matter is fully covered in the noted opinion of Judge Addison Brown, in *International Navigation Co.* v. *Atlantic Mutual Insurance Company*, 100 Fed. 304 (S. D. N. Y. 1900), *affirmed on opinion below*, 108 Fed. 987, *cert. den.* 181 U. S. 623, known throughout the underwriting world as the *St. Paul Case.*

The following rules were laid down by Judge Brown:

In case of a particular average loss on a valued hull policy, the underwriters pay the full amount of that particular average loss (not exceeding the amount insured) without any inquiry as to the percentage of loss or as to whether the actual value of the ship exceeded the insured value or not. Thus if the shipowner has his vessel insured for $100,000 and she suffers damage from marine perils which it requires $20,000 to repair the underwriters pay the shipowner a loss of $20,000, irrespective of how much the vessel was actually worth or what the relation between insured value and actual value was. If, therefore, a vessel is fully insured at any reasonable value, the underwriters, in case of sea damage, pay in full the cost of the repairs necessary to restore her to her previous condition.

In case of a particular average loss on a valued cargo policy, however, the rule is different. The proportion or percentage of loss is ascertained by comparison at destina-

tion of damaged value with sound value and the underwriters pay that proportion or percentage of the insured value. Thus, if the cargo owner insures goods for $10,000 valued at $10,000 and the goods come into port damaged to the extent of 40% of their value (as determined by comparison of sound and damaged value) then the underwriters pay a loss of 40% of $10,000, or $4,000. Except as they may be incidental to the calculation of the percentage of loss, neither the market value nor the prime cost enters into the transaction at all.

The reasons for this distinction between the rules governing payment of particular average losses on hull policies and on cargo policies are so ably and exhaustively dealt with by Judge Brown in the *St. Paul Case* (100 Fed. 317 to 326) that it seems unnecessary for us to do more than refer to this opinion.

C. General Average Losses.

General average in its original application as between the parties jointly engaged in a maritime venture long antedated the practice of marine insurance and has, in fact, nothing to do with marine insurance. It is simply an adjustment between the parties to the venture for the purpose of imposing upon all equally an extraordinary loss which one has sustained for the common safety and benefit.

When a ship, after having made sacrifices for the common safety and benefit, comes into port, it is the duty of the master to exercise a lien on the cargo for general average contributions. Since it usually takes several weeks, at the least, to collect the necessary information for the preparation of the general average adjustment, the cargo is customarily delivered against general average bonds, in which the consignees agree to pay the general average

charges for which their goods are liable. Performance of these bonds is secured either by cash deposits or by underwriters' guarantees.

After the adjustment is made up, each party pays his contribution and receives any allowance which may be made to him on account of his goods having been sacrificed.

From the standpoint of the cargo owner, therefore, a general average contribution is a charge levied upon his cargo because other goods or money has been sacrificed or spent to save the venture as a whole, including his cargo. This contribution constitutes a lien on the cargo which must be paid or secured by the cargo owner before he may take possession.

While, therefore, the cargo owner may receive his cargo in good condition, the liability of that cargo to contribute in general average constitutes a loss incurred by the cargo owner as a direct result of the peril which gave rise to the general average sacrifice, though the loss is different in character from a partial loss of the cargo.

By the York-Antwerp Rules, 1890 (Rule 17), which were incorporated into the contract of affreightment covering the cargo in the case at bar, general average contributions are ratably assessed upon the basis of actual values of the property at the termination of the venture.

D. General Average Claims against Underwriters.

General average claims under marine insurance policies arise after and subsidiarily to the primary rights between the parties to the venture themselves. If the general average charges were caused by or through a peril insured against, then the debt which the goods have incurred by reason of the lien for contribution to these general average charges is a loss which the assured has suffered through

a peril insured against and is collectible from his underwriters. 38 *Corpus Juris* 1113.

In the case at bar, the general average charges were caused through torpedoing of the *Gulflight* by a German submarine. This was a war risk. Respondent's policy on libelant's goods covered against war risk. Respondent is, therefore, liable to reimburse libelant for the general average charges assessed against libelant's goods.

While the practice of settling particular average claims under valued marine policies has, at least since the decision in the *St. Paul Case*, become definitely and uniformly established, the practice of settling general average claims has for many years differed as between New York and San Francisco on one hand and Boston and England on the other.

The difficulty arises in cases where the actual or contributory value of the thing insured differs from the agreed policy value. Under the New York or American rule (as it has been called), the underwriters give the assured complete indemnity against general average contributions, not exceeding the amount insured, without inquiry as to whether the agreed policy value differs from the contributory value.

Under the English or Boston rule, the underwriters inquire as to the contributory value. If the contributory value exceeds the agreed policy value, then they only give the assured indemnity in the proportion that the agreed policy value bears to the contributory value. If the agreed policy value is greater than the contributory value, the rule applied rigorously would give the assured more than indemnity. No case has ever extended the rule this far, but the possibility is discussed *infra*.

The following cases have applied the New York rule:

Strong v. *New York Firemen Insurance Company* (1814) 11 Johnson 323 (cargo policy);

Providence Steamship Company v. *Phoenix Insurance Company* (1882), 89 N. Y. 559 (hull policy);

St. Paul Case, supra (1900) 100 Fed. 315 to 317 (hull policy);

International Navigation Co. v. *Sea Insurance Co.* (1904, 2d C. C. A.), 129 Fed. 13, *affirming* 124 Fed. 93 (hull policy);

Maldonado & Company v. *British & Foreign Marine Insurance Company* (1910, 9th C. C. A.), 182 Fed. 744; *cert. den.* 220 U. S. 622 (cargo policy).

The following cases have applied the Boston rule:

Clark v. *United F. & M. Insurance Co.* (1811), 7 Mass. 365 (hull and cargo policy);

Brewer v. *American Insurance Co.* (1877), 123 Mass. 78 (freight, special clause in policy).

England has adopted the Boston rule both as to hull and cargo. *Marine Insurance Act of 1906*, Sec. 73; *S. S. Balmoral Company* v. *Marten* [1902], App. Cas. 511.

Libelant herein contends for the New York rule on the grounds that this rule is supported by the weight of American authority and by all pre-existing authority in our jurisdiction, and that theoretical and practical considerations meet in favoring this rule.

The Circuit Court of Appeals in its decision herein has drawn a distinction between the rules to be applied as to

hull and as to cargo policies, stating that the New York rule should be applied in cases under hull policies and the English rule in cases under cargo policies. That distinction, we respectfully contend, is not only entirely unfounded in any authority, but is groundless theoretically and practically.

POINT TWO.

DECIDED CASES ESTABLISH THE RULE OF FULL INDEMNITY, FOR WHICH LIBELANT CONTENDS, AS THE LAW OF NEW YORK BOTH AS TO HULL AND AS TO CARGO POLICIES.

The earliest authority in New York bearing directly upon the point appears to be the case of *Strong et al.* v. *New York Firemen Insurance Co.*, 11 Johns, 323 (1814). In this case the defendant insured a cargo of rice, flour and peas from Philadelphia to Lisbon, on the ship *Massasoit*. The insured value of the goods was $30,000 which exceeded slightly the invoice value.

The vessel reached Lisbon in safety, but when about one-quarter of the cargo had been delivered a storm arose, giving rise to general average sacrifices. After this accident the Captain refused to deliver the remaining cargo until security was given to cover the general average contributions. Subsequently, an adjustment was duly made up at the port of Lisbon in which the cargo which remained on board at the time of the accident was assessed a general average contribution upon a contributory value of $32,375. The invoice value of this cargo (which was substantially the same as the insured value) was only $22,313. The plaintiff, having duly paid the contribution due from the cargo,

brought this action to recover full indemnity against the defendant underwriters.

The argument of the underwriters, as reported on pages 328 and 329, was precisely the argument which respondent makes in the case at bar. They contended that they were only bound to pay in proportion to the sum they insured, that is the invoice price, and were not bound to pay the whole contribution because it was based on the actual value at Lisbon which exceeded the insured value by about fifty per cent. Defendant relied upon the Massachusetts case of *Clark* v. *Insurance Co.*, 7 Mass. 365, as being exactly in point.

The Court held the underwriters liable for the full sum claimed by the plaintiff, saying, at the bottom of page 333:

> "In this case 'it is distinctly admitted, that, as it respects the owners of the cargo and the owners of the vessel, the average was correctly stated, and rightfully paid in Lisbon'. That this is a loss for which the assurers are liable, is not disputed, and there is no principle more firmly established than that they are bound to return the money which the assured has been *obliged* to advance in consequence of any peril within the policy, provided it be fairly and honestly paid, and does not exceed the amount of the subscription."

In deciding this case the Court also concerned itself with the question of whether or not an adjustment made fairly in a foreign port, but under a law differing from that of the home port, would bind underwriters of the home port. This question has now been settled beyond doubt in accordance with the ruling made in this case. Nevertheless, the question involved in the case at bar was

clearly before the Court, and from the report of the defendant's argument it seems to have been its chief point.

It is respectfully submitted that this decision of the highest court of New York, which antedates the adoption of the other rule in England, thoroughly justifies the description of the rule of full indemnity as the "New York Rule", and should be taken to establish that rule as the law of New York.

In 1882 the Court of Appeals, decided the case of *Providence Steamship Company* v. *Phoenix Insurance Company*, 89 N. Y. 559. This was a suit on a hull insurance policy where the insured steamship, during the life of the policy, went ashore in a storm, and the assured in consequence thereof paid a salvage bill amounting to $21,840. The actual value of the vessel, as shown in the general average statement, was $275,000, but the insured value of the vessel was only $75,000. The assured contended that the underwriters were liable to reimburse him for the full amount of the salvage. The defendant underwriters contended that they were only liable to reimburse the assured for that proportion of the salvage charge which the insured value of the vessel bore to her actual value, namely, 3/11ths.

The Court upheld the contention of the assured on the ground that to permit the underwriters to invoke the actual value of the vessel for the purpose of reducing the claim against them, would be a violation of the principle of valued policies.

Judge Danforth wrote, on page 564:

> "As between these parties, no inquiry is pertinent as to the actual value of the steamer, for as to them it has been fixed by agreement, and for every purpose (fraud being out of the question) it must be taken as so fixed that the insured might be indem-

nified to that amount, for all losses occasioned 'by perils of the sea and navigation.' The value so fixed and inserted in the policy is said to be in the nature of liquidated damages. (3 Kent, 273). It is, therefore, not open to inquiry or dispute after a loss occurs, but is conclusive between the parties in respect of all rights and obligations which arise upon the policy; and the learned commentator above cited disapproves the doctrine of certain cases which suggest a limitation to this rule, by applying it only to a total loss, saying, 'the better opinion of the text-writers is, that in settling all losses, total or partial, the valuation of the property in the policy is to be considered as correct in the adjustment of the loss, and the true measure and basis of the valuation according to the contract of indemnity'."

* * * * * *

"Now the contention of the defendant here is that, as the real value of the steamer was $275,000, the sum of $200,000 represents the interest of the owners and should share the loss caused by the recovery of the ship. The answer to it is that given in the case cited. The insurers are estopped from saying there was any value in excess of the $75,000 agreed upon, and to that extent they undertook to indemnify the owners. They now seek to divide the loss by presenting a different basis of value. If they succeed the assured will lose the indemnity for which they paid, and the consequence of a loss would be cast upon them. Such a result is required by no adjudged case, and would be against the principles both of law and equity. The sum now claimed for the expenses incurred is, we think, justly due the insured on account of damages caused by the perils insured against, and as it is within the limits of the sum named, should be paid by the insurers, according to the terms of the engagement entered into by them."

We have already referred to portions of the decision of Judge Brown in the *St. Paul Case* (100 Fed. 304; *affirmed on opinion below*, 108 Fed. 987; *certiorari denied*, 181 U. S. 623). That also was a suit against underwriters on hull policies. The *St. Paul* stranded, and in freeing and repairing her the assured was forced to pay about $135,000 for salvage and $107,000 for repairs and attendant expenses. The actual value of the steamer before the stranding was $2,100,000, but the agreed policy value, to which extent she was insured, was only $1,350,000.

In connection with the liability for the salvage claim, the underwriters contended that as the actual value (which was determinative in adjusting the salvage charge) exceeded the insured value, they should only be held liable to reimburse the assured in the proportion which the insured value bore to the actual value. The portion of opinion dealing with this question is found on pages 315-317. The Court first recognized that the salvage claim against the underwriters was closely akin to a claim for general average contribution and pointed out that under the law of England and Massachusetts, the contention of the underwriters would appear to be correct. The Court then cited the treatises of *Phillips* and *Dixon*, and the *Providence S. S.* case, to show that the New York rule was different, stating that *in its view the New York rule was more consonant with the terms of valued policies and with the object of valuation in policies, which is to limit both parties on the question of value*. Accordingly, the underwriters were held not entitled to apply the rule of proportion, but liable for the full salvage charge.

Again in another case arising from the *St. Paul* disaster the District Court for the Eastern District of New York and the Circuit Court of Appeals for the Second Circuit

recognized the New York rule as the law of New York. *International Navigation Company* v. *Sea Insurance Company*, 124 Fed. 93; 129 Fed. 13.

It is true that in the *St. Paul* cases, and in the *Providence Steamship* case, hull policies only were involved. There is, however, nothing anywhere in the opinions which indicates in the slightest that the respective Courts would have made any distinction between payments of general average contributions under hull and under cargo policies. On the contrary, it is clear that to permit the underwriters to depart from the insured value and invoke the actual value for the purpose of reducing the recovery against them, is quite as much a violation of the theory of valued policies when applied to general average contributions under cargo policies, as when applied to general average or salvage contributions under hull policies. In each case the loss sustained is a loss of money, and not a loss of the property insured.

Again in 1910, the precise question involved in the case at bar came before the Circuit Court of Appeals for the Ninth Circuit in the case of *Maldonado & Company* v. *British & Foreign Marine Insurance Company*, 182 Fed. 744, *certiorari denied* 220 U. S. 622.

In that case, the respondent insured the libelant's shipment of kapok on a voyage from the East Indies to San Francisco. The agreed policy value of the kapok was $48,623. On the voyage, the ship caught fire and various general average charges were incurred. Toward these charges, the cargo in question was made to contribute $22,544.77 in general average, this contribution being based upon a contributory value of $66,513.29.

The libelant contended that the respondent underwriter was liable to reimburse it for the whole of the general

average contribution. The respondent's contention was that since the contributory value exceeded the insured value, the respondent was only liable for such proportion of the general average contribution as the insured value bore to the contributory value.

These are precisely the same contentions that are being advanced in the case at bar.

Judge Morrow wrote a well knit and exhaustive opinion. We may summarize his conclusions as follows:

1. A contract of insurance is a contract of indemnity within the limit of the valuations stated in the policy.

2. It is settled law that a general contribution fairly assessed upon the thing insured, even though it be assessed under a foreign law, is a loss against which the contract of insurance is a contract of full indemnity.

3. The rule of partial indemnity for general average contributions has been referred to as the English or Boston rule, and has been applied in this country in Massachusetts.

4. The rule of full indemnity is known in the authorities as the New York or American rule, and has been applied in the State and Federal Courts of New York in the cases cited above.

5. Neither the *St. Paul Case* nor any other case cited makes any distinction with respect to payment of general average losses as between cargo policies and hull policies. In England there is no such distinction; the English rule is applied the same with respect to losses on cargo policies as on hull policies. There is no satisfactory or

substantial reason why there should be one rule in respect of cargo and another in respect of hull.

6. The English rule is unfair in that it works in favor of the underwriter but never against him.

7. Insurance companies have always proven attentive and skillful in stipulating exemptions from liability in their policies. As the full indemnity claimed by the assured was not excluded from the risks covered, it is a fair and reasonable inference that such exclusion was not intended.

8. Section 2744 of the Civil Code of California (providing that a marine insurer is liable for a general average contribution) being taken from the proposed Code of Civil Procedure of New York (Section 1511), which was undoubtedly framed as the embodiment of the law of New York as established in the cases cited, shows that the New York rule is established for the port of San Francisco.

9. Decree for libelant in the sum claimed.

This decision is more than a decision on the California law. When the case came before the court sitting in California, there were in that jurisdiction no decided cases bearing upon the question. It was, therefore, necessary for the court to inquire into the sources of the California law. This the court proceeded to do and came to the conclusion that the California law was based upon the New York law so far as concerns payment of general average losses by marine insurers.

The decision, therefore, is in effect a decision on the law of New York.

POINT THREE.

THE TEXT WRITERS FOR NEARLY A CENTURY HAVE UNANIMOUSLY RECOGNIZED THE RULE OF FULL INDEMNITY AS THE LAW AND PRACTICE IN NEW YORK. NO DISTINCTION IS MADE BETWEEN CLAIMS UNDER CARGO AND HULL POLICIES.

Phillips on Insurance went through five editions and one supplement, the first edition being published in 1823 and the last in 1867.

At Section 1410 of the 5th Edition this writer (who lived in Cambridge, Mass.) expounds the Boston or English Rule at some length, but he states toward the end of the section:

> "The practice is different in New York, where, under a valued policy in which the whole value as fixed in the policy is insured, the underwriters contribute the whole amount assessed upon the subject in general average, whether it contributes on a value greater or less than that at which it is fixed in the policy, and so proportionally, if one half, one quarter, or any other proportion of the value is insured."

This same statement is found in the earlier editions, appearing first, we believe, in 1834.

Phillips points out that as between the two rules "there is nothing in the policy that favors one of these modes of construction in preference to the other, each being equally consistent with the language of the instrument". He states that the cases seem to be on the side of the English Rule but he cites only the Massachusetts and English cases. The *St. Paul Case*, the *Providence Steamship* case, and the *Maldonado* case all came afterwards.

In 1862 *Dixon on Insurance* was published at New York. On page 162 of the work it appears that the author, Francis B. Dixon, was an adjuster of averages for one of the principal marine insurance companies of New York, and that his experience with payment of general average losses by marine underwriters was very extensive.

On page 44 Mr. Dixon writes:

> *"Are the underwriters on cargo, liable to pay contribution only in the proportion which the sum insured bears to the actual value; or are they liable for the whole amount assessed upon the cargo in general average?*
>
> "According to the practice in Boston, where the contributory value exceeds the value in the policy, the underwriter is liable in the proportion which the sum insured bears to the actual value. *Clark* v. *Unit F. & M. Ins. Co.*, 7 Mass. R., 365.
>
> "In New York, the practice is different under a valued policy in which the whole value as fixed in the policy is insured, the underwriters contribute the whole amount assessed upon the subject in general average, whether it contributes on a value greater or less than that at which it is fixed in the policy, and so proportionally, if one-half, one-quarter, or any other proportion of the value is insured."

The same statement was carried into Mr. Dixon's second and last edition of the work, which was published in 1866.

Richards on Insurance, Third Edition, published in 1909, clearly recognizes that the American courts, with the exception of those of Massachusetts, have departed from the English rule (Section 210).

Gow, an English writer who had a number of years experience as a marine underwriter in New York, in his treatise on *Sea Insurance* (1914), recognizes that the rule of

full indemnity is the law and practice in New York (page 165).

It is thus seen that the text writers for nearly a century have recognized the rule of full indemnity as the law and practice of New York, both with respect to losses on cargo policies and on hull policies.

We have searched through the text books with considerable care and have been unable to find in any of them any intimation that any rule other than the rule of full indemnity has been applied in New York.

Likewise we have been unable to find any mention of a distinction between the settlement of general average losses on hull policies and on cargo policies. On the contrary, the passages cited above clearly indicate that the respective writers did not believe there was any such distinction.

POINT FOUR.

THE CIRCUIT COURT OF APPEALS APPLIES A DOCTRINE OF CO-INSURANCE WHICH IS INCONSISTENT WITH THE THEORY AND PURPOSE OF VALUED POLICIES.

The Circuit Court of Appeals states that the question involved is whether "the insured is co-insurer to the extent that the sound value of the cargo is more than the agreed value" (R., 189-190), and bases its decision on the ground that the assured is such a co-insurer.

This decision, we respectfully submit, is grounded in an erroneous application of the doctrine of co-insurance which leads to a result wholly inconsistent with the theory and purpose of valued policies.

With valued policies true co-insurance arises only in cases where the assured has not taken out enough insurance

to cover the whole agreed value. If, for example, the assured takes out only one policy subscribed for $500 on property valued at $1,000, then he has only insured one-half of the risk and has himself to bear the other half. He is a true co-insurer to the extent of one-half of the risk, and none would deny that he must share the risk to the same extent as would a second underwriter had he insured that half of the risk.

If, on the other hand, the assured takes out policies in which the subscribed amounts total in excess of the agreed value, then he has double insurance on part of the risk.

If, however, the assured takes out policies which are subscribed so as exactly to cover the whole of the agreed value, then, strictly speaking, he is not a co-insurer nor does he have double insurance. He has taken out full insurance. No part of the risk is uncovered; no part is covered twice.

The effect of the mutually agreed valuation is to establish a norm to govern the dealings between the assured and the underwriter. The market value of the property becomes external and immaterial as between the parties.

If the market value be less than the agreed value it would be absurd to say that there was any double insurance. If it be more than the agreed value it is, we submit, not proper to say there is co-insurance.

Value is often a vague question of opinion. Moreover, the value of property to its owner is quite different from the market value. The utility, then, of valued policies is obvious.

Commonly transfer of title accompanies the carriage of goods overseas. Commonly such goods are being bought and sold under contracts. They are being dealt with on the basis of agreed sales values.

It is customary to insure the goods for overseas shipment on the basis of the agreed sales value, plus, usually, a small amount for charges or profits. If the goods arrive the seller gets his money and the buyer receives his goods. If the goods are totally lost the seller gets his money from the underwriter and the buyer remains in *statu quo*. If the goods are partially lost or damaged the seller gets the money for the lost portion from the underwriter, and for the saved portion he either gets the money from the buyer or gets the goods back.

The whole transaction is carried through on the basis of the agreed value. The market value remains external and immaterial to buyer, seller and underwriter.

Suppose that the goods arrive in good condition but are subject to contribution in general average. The buyer receives the goods; the seller gets his money. They both look to the underwriter to pay the general average contribution.

The underwriter, however, tells them that the contributory value exceeded the insured value; that they are co-insurers for the excess and must bear a portion of the contribution themselves.

Do they not completely answer the underwriter when they say that the whole transaction was done on the basis of an agreed value; that the underwriter issued to them full insurance on that basis; that the market or contributory value is expressly made external and immaterial by their agreement with the underwriter and for that reason there can be no co-insurance?

It is true that the underwriters' loss may be aggravated by the increase of market value but the loss was caused by a peril insured against. It is a familiar doctrine of insurance law that the underwriter is liable for a loss directly

caused by a peril insured against, even though a concurrent or aggravating cause may have been due to a peril not insured against.

If the goods are not being sold while in transit, the situation is no different. The fact that the assured has taken out a valued policy shows that he prefers his own valuation of the goods to market value. Equally as in the other case, the underwriter has undertaken to deal with him on the basis of an agreed value. Both parties have made the market value external and immaterial.

We respectfully submit that Judge Addison Brown and the New York Court of Appeals were correct when they held that the rule of proportion when applied to general average losses violates the principles of valued policies.

Underwriters urge that in cases of undervaluation the rule of full indemnity violates the agreed valuation, for, they say, the assured has agreed that his goods are worth only the policy value, whereas, in fact, they exceed it.

This argument, it seems to us, involves a distortion of the obvious meaning of a valued policy. When an assured takes out a valued policy he does not represent, nor would any underwriter assume he represented, that the actual value of the goods is identical with the policy value. The underwriter knows well that the goods may have a different value and may change in value. He knows that they may be assessed for general average on a different value.

To say, as the Circuit Court of Appeals does (R., 191), that the agreed value "assures the underwriter against increases in value" seems to us wholly to misconceive the purpose of the contract. It is the purpose of the contract for the underwriter to assure the assured, not vice versa. Limitations to this obvious purpose should not be implied without compelling reasons.

Underwriters contend that since the premium is adjusted on the basis of the policy value it is unfair to hold them for general average contributions assessed upon actual value. The answer to this is that the legal extent of the policy should determine the necessary premium; the premium should not determine the legal extent of the policy. It is common knowledge that in certain classes of insurance the rate of premium is dependent upon the relation between insured value and actual value. And the underwriter, not the assured, fixes the premium.

That the English rule violates the principle of valued policies is further demonstrated by the fact that the rule is inconsistent within itself. This inconsistency was recognized by the Court of Appeal and the House of Lords in *Steamship Balmoral Company* v. *Marten* (*supra* [1902] App. Cas. at 514).

Suppose, for example, that a cargo owner has goods valued in policies at $700,000, but which have increased in value during the voyage to $900,000, and there is a general average as follows:

Total General Average charges	$120,000

Contributing values

Vessel	$	200,000
Freight		100,000
Cargo		900,000
Total	$	1,200,000
Vessel Contributes		20,000
Freight "		10,000
Cargo "		90,000
Total	$	120,000

By the New York rule the cargo owner would be indemnified by his underwriters for the full $90,000.

By the English rule the underwriters would only pay 7/9ths of $90,000, or $70,000.

Now if the English rule is based on the premise that the valuation in the policy "assures the underwriters against increases in value" the result as shown above cannot be upheld. The underwriters should pay upon the same basis as they would have paid on, had the cargo been worth only the policy value. As between the cargo owner and his underwriter a new adjustment should be cast as follows:

Contributing Values—Pay in proportion.

Vessel	$ 200,000	pays	$ 24,000
Freight	100,000	"	12,000
Cargo	700,000	"	84,000
Total	$1,000,000	"	$120,000

Hence if the English rule be based on the premise upon which it is assumed to be based, the underwriters should pay $84,000 but they offer only $70,000.

The fact is that the logic of the English rule is specious. The ratio of insured value to contributory value is undoubtedly attractive to underwriters, but there is no more sound logic to support its application in cases of undervaluation than there is in cases of overvaluation where, as we show in the next point, its application gives the assured more than indemnity so that he makes a clear profit from the casualty.

POINT FIVE.

THE CIRCUIT COURT OF APPEALS MAKES A DISTINCTION BETWEEN CARGO AND HULL POLICIES WHICH IS UNFOUNDED IN PRACTICAL CONSIDERATIONS AND IN AUTHORITY. THE RULE OF FULL INDEMNITY DOES JUSTICE BECAUSE IT INDEMNIFIES THE ASSUREDS FOR ACTUAL DISBURSEMENTS NECESSITATED BY PERILS INSURED AGAINST. THE DECISION IS IN COMPLETE CONFLICT WITH THE RATIONALE OF THE *St. Paul Case*.

The chief ground of the decision of the Circuit Court of Appeals is that, since particular average losses on cargo policies are settled by the rule of proportion whereas on hull policies they are settled by the rule of full indemnity for repairs, there should be a similar distinction in the settlement of general average losses. The Court does not question its earlier decision in the *St. Paul Case*, but distinguishes the case at bar solely on the ground that here a cargo policy is involved, whereas the *St. Paul Case* involved hull policies.

The distinction in the case of particular average is based entirely on practical considerations as is shown by the fact that the distinction would be made even though the policies are in identical terms.

This distinction, however, should not be carried into general average unless there are practical considerations which require it. Cogent reasons should be shown before we construe the same contract differently simply because in one case it is an insurance on hull and in the other on cargo. Any doubts, we submit, should be resolved in favor of uniformity.

While the practical considerations which have given rise to the distinction in particular average are somewhat

obscured in history, the matter has been exhaustively covered by Judge Addison Brown in the *St. Paul Case* (100 Fed. 317-326).

Where goods are damaged by a sea peril, commonly it is quite impossible to repair or restore them to their original state; they must be sold or used in their damaged condition. The question as to the amount of damage is easily answered in terms of a proportion.

It is eminently fair that the underwriter pay as a loss the same proportion of the agreed value as is represented by the physical loss. In that way the agreed value can be made effective and neither party will be involved in fluctuations of market. Another rule would work much unfairness.

If, for example, the policy value of goods is $4,000 and they are half damaged by a sea peril but come to a rising market so that they sell in damaged state for $4,000, the underwriter should not avoid all liability, for the merchant has physically lost one-half of his goods. If, on the other hand, they come to a falling market and sell for only $1,000, the underwriter should not be held for $3,000, for the sea peril has not caused that much damage. If that were the way the insurance was to operate on partial losses of cargo, then the underwriter would be insuring market values and against losses due to the fluctuating values of the goods. But, in truth, the insurance is against physical damage by sea perils. "Neither the insurer nor the assured should gain, or lose from such accidental circumstances."

By ascertaining the percentage of loss and applying it to the policy value, the integrity of the agreement as to the value is maintained, for the underwriter pays such part of the agreed value as corresponds to the physical loss of the cargo.

But such losses bear no similarity to the out-of-pocket disbursements of the cargo owner for general average contributions levied upon his goods.

Ships, on the other hand, are not kept for sale. When a ship suffers damage from a marine peril, her owner does not sell her; he repairs her and thus restores her to her previous condition. The contract of insurance is primarily a contract of indemnity and, obviously, the proper measure of indemnity is the cost of repairs. The assured has paid out that money for the sole purpose of restoring the vessel to her previous condition. The shipowner is reimbursed by his underwriters for a direct expenditure necessitated by a sea peril.

It is thus apparent that there is a striking analogy between the practical considerations applying to particular average on hull and to general average on both hull and cargo, for both are losses caused by actual expenditures of money due to perils insured against. The rule of full indemnity is quite as appropriate in the one case as in the other for it does full justice.

When cargo or hull arrives in port subject to a general average contribution, the only loss which the assured will sustain by reason thereof is through the lien imposed on it. It is not a physical loss of property insured, but is a debt which the property has incurred. There is one, and only one, way for the assured to be rid of the lien and that is for him to pay it off with his money. Having done so, his property is cleared of all effects of the sea peril. The situation is exactly as though he had repaired damaged property and completely restored it to its previous condition. His loss is exactly measured by a payment of money.

We may, indeed, imagine a case where cargo has been damaged by a sea peril in such a way that the assured can and does completely repair the damage. In such a case the loss of the assured should not be settled by the rule of proportion but he should be indemnified by his underwriter for the cost of the repairs.

Such is the ruling of *Francis* v. *Boulton* (1895) 65 L. J. Q. B. 153; 73 L. T. 578; 8 Asp. M. C. 79. There the assured repaired the damage to his cargo, although he was not successful in restoring it to its original condition. The court, however, held that he was entitled to full indemnity from his underwriter for the cost of the repairs. The rationale of the decision is such as to imply unmistakably that if the repairs had completely restored the cargo, the loss would have been settled according to the rule of full indemnity for repairs and not according to the rule of proportion.

Another illustration of this rule is *Gracie* v. *New York Insurance Co.*, 8 Johnson 237 (1811). There cargo was insured for its prime cost by a policy covering the risk of capture. On the voyage the cargo was seized by a French privateer. The assured succeeded in obtaining return of the property by putting up a bond for its appraised value which exceeded the prime cost, i.e. insured value, by 50%. The prize court of last resort sustained the capture and the assured had to make good on his bond, but meanwhile he had sold the goods at destination for more than double the prime cost. He then brought this action against the underwriter, as for partial loss, to recover indemnity for the amount paid on the bond.

Kent, C. J., writing for the court, held that the underwriter was liable for full indemnity up to the amount of the subscription. On page 247 he wrote:

"The assured receives no more than his indemnity, by being reimbursed the sum he has paid. The voyage goes on, and becomes a matter of profit or loss, precisely as if the peril had not happened. • • • He is not to make a profit of the insurance. • • • But in this case, he asks only for the money he has been obliged to pay. He cannot possibly make the insurance lucrative. He asks only to be indemnified from the peril; and whether the property recovered went to a rising or falling market is a question not belonging to the case. That event remains the same as if there had been no capture. If property be ransomed from pirates or enemies, or recovered from shipwreck, at a loss of 60 *per cent* the remainder may possibly go to a market which will render the voyage profitable, even if there had been no insurance, and the expense incurred was a dead loss. So the voyage may be ruinous, if only one *per cent* be taken away by a peril, and that one *per cent* be insured. The insurer, in a case like this, has nothing to do with these results. He must return the money which the assured has been obliged to pay, in consequence of a peril, provided it was fairly and *bona fide* paid, and does not exceed the amount of the subscription."

Another analogous situation arises in the case of claims against underwriters under the sue and labor clauses of the policies. Such claims are very similar in nature to general average claims, in that the disbursements are made for the same purpose, viz., to preserve the insured property from threatening perils. In many cases it is a matter of difficulty even to distinguish between the two. Sue and labor expenditures, if reasonably incurred, are always reimbursed in full to the assurred by the underwriters.

Certainly there is no satisfactory reason why general average contributions should be treated differently.

It is thus apparent that every consideration which dictates the rule of full indemnity in settlement of particular average on hull, and in the settlement of repair and other disbursements by the assured, applies with equal force to general average contributions levied on cargo as well as hull.

The loss is always exactly represented by the number of dollars which the assured had to spend in paying off the general average lien. Complete and exact indemnity is always possible. The New York rule of full indemnity gives in all cases that exact indemnity and nothing more.

To the same extent that the rule of full indemnity is fitting in these cases, the rule of proportion is a misfit.

This becomes peculiarly evident in cases where the insured value exceeds the market value. Suppose, for example, that goods, the agreed value of which is $1000, come to a falling market, where their sound value is only $500. Now if the goods are half damaged by a particular average cause, the assured will receive one-half of the policy value or $500 from the underwriter, although the damage, as measured in the fallen market, is only half that.

There is, however, nothing questionable in permitting the policy valuation to have this effect. The value of the goods to the assured may be quite different from their market value and it does not follow at all that the assured's true loss is accurately measured on the basis of the fallen market value. The agreed valuation is simply given its full effect.

Suppose, however, that instead of being half damaged the goods are delivered sound, but are assessed a general average contribution of 50% on the fallen market value, or $250. Should the underwriter pay the assured $250 or $500?

The Circuit Court of Appeals says that on principle the underwriter should pay the assured $500 (R., 192). This is the extremity to which the Court is put to justify its rule, because on principle the rule, if sound, must be applicable to all situations.

We respectfully submit, however, that there cannot be the slightest justification for this result. Indemnity for the loss of goods may well depend on many circumstances other than market value, but indemnity for a debt of $250 is $250, neither more nor less.

If the assured is allowed to recover $500 indemnity for his debt of $250, then he makes a clear profit out of the casualty. He makes his insurance lucrative, which is precisely what was frowned on by Chancellor Kent in the case just cited. We respectfully submit that a principle of law which, when applied to this ordinary contract of marine insurance, results so questionably is wholly unsound.

In practice English underwriters meet this difficulty simply by refusing to apply the rule of proportion in cases where the insured value exceeds the contributory value. They apply the rule of proportion where it works to the benefit of the underwriter, but where, as in the case just mentioned, it would work to the benefit of the assured, they trust it to fall from its own absurdity.

Surely this demonstrates that the rule of proportion is a misfit in this situation.

While Judge Brown, in the *St. Paul Case*, did not discuss general average losses on cargo policies, nevertheless every consideration which moved him to apply the rule of full indemnity to general average losses on hull policies, applies with equal force to such losses on cargo policies.

We respectfully submit that the decision of the Circuit Court of Appeals in the case at bar conflicts completely in its rationale with the decision in the *St. Paul Case*.

The Circuit Court of Appeals cites no authority to support the distinction which it makes between this case and the *St. Paul Case*. We respectfully submit that there is no such authority.

The cases and texts bearing directly upon this question cover a span of nearly one hundred and twenty years. Not in any of them is there a suggestion that a different rule should be applied to goods than that applying to ships. England and Massachusetts have gone one way, New York the other, but both agree in applying their respective rules uniformly to ship and cargo.

Surely if there had been any merit in the distinction as made by the Circuit Court of Appeals someone would have suggested it long before.

POINT SIX.

APPLICATION OF THE ENGLISH RULE MAKES THE INSURANCE MISLEADING TO THE ASSURED IN THAT A POLICY WHICH PURPORTS TO BE A COMPLETE COVER AFFORDS ONLY PARTIAL INDEMNITY IN CERTAIN CASES. THE RULE THAT THE POLICY MUST BE CONSTRUED AGAINST THE UNDERWRITER DICTATES THE AVOIDANCE OF THIS RESULT BY APPLYING THE RULE OF FULL INDEMNITY.

A serious objection to the English rule is that it results in making the policy of insurance misleading to the assured. For purposes of illustration, let us suppose a typical case.

A merchant under a C. I. F. contract purchases certain goods for $1000. He pays the seller $1000 and receives in return an ocean bill of lading and a policy of insurance which shows that the goods are fully insured against sea perils at invoice plus ten per cent, say $1100 valued at

$1100. Next day the merchant sells the goods for $1100 "to arrive at port of destination", thus making a profit of $100.

Any prudent business man might enter into such a transaction with the assurance that he was taking no risk, at least as to sea perils.

The goods arrive safely at port of destination but the ship has stranded on the way and the market has risen, so that they are subject to a general average contribution of, say, 40% on a contributory value of $2200, i. e., $880. The merchant has to pay this contribution in order to get the goods and fulfill his obligation to deliver to his buyer.

He then asks indemnity from the underwriter for the general average contribution, but the underwriter, under the rule of proportion, would give him only $440.

The merchant would then be out of pocket $440 on the transaction, purely as a result of the sea peril which caused the general average.

There is nothing whatever in the policy of insurance to warn the merchant of this contingency. On its face the policy appears in every way to give him a complete and full cover against sea perils to the extent of the valuation upon the basis of which he was dealing.

Never, we submit, was there better cause to invoke the familiar rule:

> "The language of the policy is, moreover, the language chosen by the insurers. In case of doubt it is not only to be construed against them but it is further subject to the rule of construction that it must be understood in the sense in which the insurers knew that the assured understood or would naturally understand it." *St. Paul Case* (100 Fed. at 308).

Many marine policies written in this country contain a special clause providing for the settlement of general average and salvage losses according to the rule of proportion in cases where the contributory value exceeds the assured value. Mr. Eldert, president of respondent, testified that such clauses were in use and suggested that the Boston Insurance Company inserted them in their cargo policies (R., 26).

In the case put above, the presence of such a clause in the policy would have warned the merchant that he was not fully protected against general average arising from sea perils. If he had been prudent he would then have made some arrangement for protection against the contingency. Without such a clause, however, the merchant has no warning that the policy is not what it appears to be—a full cover.

Perhaps the reason insurance companies are reluctant to use the special clause is because if it be used the policy advertises on its face that it is not a full cover. Objections from assureds would undoubtedly be forthcoming.

These circumstances present a case peculiarly apt for the application of the rule that

> "Where a policy of insurance is so formed as to leave room for two constructions, the words used should be interpreted most strongly against the insurer." *Liverpool, London & Globe Insurance Company* v. *Kearney*, 180 U. S. 132 at 136.

This principle has been stated by this Court many times. See for example *London Assurance* v. *Companhia De Moagens*, 167 U. S. 149 at 159; *Royal Insurance Company* v. *Martin*, 192 U. S. 149 at 162; *Mutual Insurance Company* v. *Hurni Company*, 263 U. S. 167 at 169.

POINT SEVEN.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IN REFUSING TO FOLLOW EARLIER DECISIONS OF COURTS OF LAST RESORT VIOLATES THE PRINCIPLE THAT A CONTRACT IS TO BE CONSTRUED IN THE LIGHT OF THE LAW AS DECLARED AT THE TIME OF ITS MAKING. *Stare decisis* IS PECULIARLY APPLICABLE.

The contract of insurance here involved was entered into in New York and was to be performed in New York. At the time this contract was made (1915) the law of New York on the point here involved was well rounded out by decisions of courts of last resort.

The state court of last resort had in the *Strong* case applied the New York rule to a cargo policy, and in the *Providence Steamship* case it had applied the same rule to a hull policy.

The Circuit Court of Appeals for the Second Circuit had in the *St. Paul Case* applied the New York rule to a hull policy, and in the *Maldonado Case* the same rule had been applied to a cargo policy by the Circuit Court of Appeals for the Ninth Circuit in a decision based upon New York law. In both of these cases *certiorari* was denied so that the decisions were in courts of last resort. Neither in the state or federal courts, nor in any text, had it ever been questioned that the New York rule was the law of New York as applied to both hull and cargo policies.

The following principle has been stated many times by this court:

> "It is also settled that the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it as if they were expressly referred to or

incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge, and enforcement." *Von Hoffman* v. *City of Quincy*, 4 Wall. 535, at p. 550.

See *Walker* v. *Whitehead*, 16 Wall. 314, 317; *Rees* v. *City of Watertown*, 19 Wall. 107, 121; *Edwards* v. *Kearzey*, 96 U. S. 595, 601; *Siebert* v. *Lewis*, 122 U. S. 284; *Northern Pacific Ry.* v. *Wall*, 241 U. S. 87, 91.

Under these decisions it is clear that if the State of New York had, after the making of this contract, enacted a statute changing the law of New York to conform with the English rule, that statute, applied to this contract, would have been void as being an impairment of its obligations.

Indeed, if the Court of Appeals of New York had reversed itself after the contract was made, this court would, under the reasoning of *Gelpcke* v. *City of Dubuque*, 1 Wall. 175, have interpreted the contract in the light of the earlier decision.

Technically, we presume, the decision of the Circuit Court of Appeals in the case at bar does not conflict with the constitutional inhibition against impairment of the obligations of contract. Practically, however, the effect of the decision is just that. The same juridical principles which dictated the insertion of that clause in the Constitution should be most persuasive here.

Stare decisis has long been recognized as being of the highest importance in commercial and property cases where contracts and deeds are made in reliance upon the law as declared by decisions of courts of last resort. *Black's Law of Judicial Precedents*, page 693. New York is the American center of marine underwriting and it is fair to assume that thousands of merchants, themselves and through their

insurance brokers, have taken policies with New York underwriters relying upon the law of New York as declared in the above-mentioned decisions.

Respondent has urged below the desirability of conforming our law to that of England. This the decision of the Circuit Court of Appeals wholly fails to accomplish, for, as we have shown, it draws a distinction between hull and cargo policies which is unknown in England. The only way in which our law can be conformed to that of England is by overruling the *St. Paul Case* and the other decisions on hull as well as cargo.

When it is remembered that the New York rule was adopted here before the English rule was adopted in England, and when all of the considerations above pointed out are taken into account, it is clear that uniformity with England can only be achieved at the price of sacrificed principles many times more valuable than any uniformity, however desirable.

LAST POINT.

THE DECREE OF THE CIRCUIT COURT OF APPEALS SHOULD BE REVERSED AND THE ORIGINAL DECREE OF THE DISTRICT COURT AFFIRMED.

Respectfully submitted,

IRA A. CAMPBELL,
Proctor for Petitioner.

New York, February 14, 1929.

NOV 1 19
CHARLES ELMORE C

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1920.

No. 506

GULF REFINING COMPANY,
Petitioner,
(*Libelant-Appellee below*),

against

ATLANTIC MUTUAL INSURANCE COMPANY,
Respondent,
(*Respondent-Appellant below*).

BRIEF FOR RESPONDENT UPON PETITION BY LIBELANT FOR WRIT OF CERTIORARI.

J. M. RICHARDSON LYETH,
Proctor for Respondent.

(Printed by Appellate Printing Co., 30 Church St., New York.)

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Supreme Court of the United States,

OCTOBER TERM, 1928.

No.

GULF REFINING COMPANY,
Petitioner
(Libelant-Appellee below),

AGAINST

THE ATLANTIC MUTUAL INSURANCE COMPANY,
Respondent
(Respondent-Appellant below).

BRIEF FOR RESPONDENT UPON PETITION BY LIBELANT FOR WRIT OF CERTIORARI.

Statement Under Rule 25.

The opinion of the Commissioner appointed by the District Court to hear and report (R. 160-179) is reported only in 1927 Am. Mar. Cas. 1669.

In confirming the Commissioner's report (R. 181) the District Court did not write any opinion.

The opinion of the Circuit Court of Appeals reversing the District Court and the Commissioner (R. 189-194) is reported in 27 Fed. (2d) 678, and 1928 Am. Mar. Cas. 1371.

The decree of reversal and order for mandate of the Circuit Court of Appeals was filed on July 24, 1928 (R. 195).

Jurisdiction of this Court is invoked under the Act of February 13, 1925.

Argument.

The respondent favors the granting of a writ of certiorari to review the decision of the Circuit Court of Appeals for the Second Circuit, which reversed a decree in favor of the libelant by the United States District Court for the Southern District of New York, for the following reasons:

I. There is a clear conflict in the decisions of the Circuit Court of Appeals for the Second and Ninth Circuits. *British & Foreign Marine Insurance* v. *Maldonado Co.*, 218 Fed. 744 (9 C. C. A.) cannot be distinguished from the present case, and that decision is directly opposite to that of the Circuit Court of Appeals for the Second Circuit, in this case. Briefly stated, the present case presents the question whether an underwriter of cargo, when the actual value of the cargo exceeds the insured value, must pay all the general average charges of such cargo or only such proportion of such charges as the insured value bears to the actual value. The latter was the decision of the court below. Respondent, of course, believes that this decision is right. It conforms to the law of England and of practically every other maritime nation in the world (R. 153) and to the law of the State Courts of Massachusetts. But respondent believes that it is to the advantage, not only of its own business but of marine underwriters on cargo generally, and to the advantage of merchants dealing in foreign and coastwise trade, that the law of the United States should be settled by a decision of this Honorable Court rather than that the conflict between the Second and Ninth Circuits should be allowed to stand. Respondent insures cargoes consigned to and from every port in the United States. Cases are constantly arising on such cargoes, insured by it, which present the question involved in this case. The law of the ports of Boston and New York is settled in accordance with the decision below. The law of the port of San Francisco and other Pacific ports is settled, by the *Maldonado* case, contrary to the decision below. There is probability of dispute with respondent's assured when the question arises in the Atlantic ports south of New York and

all of the Gulf ports and the Great Lakes ports. No lawyer can foretell which rule the Federal Courts of the other seven Circuits will follow. Frequently the amount involved in connection with a single shipment will not justify litigation, although in a large general average case the aggregate amounts involved in this question on all shipments would be very considerable. Therefore, if the question is not settled by this Honorable Court the respondent and other marine underwriters will be subject to harassing disputes with their assured, which will be exceedingly difficult to settle even by litigation.

II. The law, practice and custom of England, France, Germany, Holland, and Japan, are in accord with the decision of the court below in this case (R. 153). This Court has stated that in matters of mercantile and maritime nature, and especially in cases of marine insurance, it is highly desirable that if possible the law of the United States and of England should harmonize.

The Eliza Lines, 199 U. S. 109, at p. 128;
Queen Ins. Co. of America v. *Globe & Rutgers Fire Ins. Co.*, 263 U. S. 487.

Respondent is most desirous that the laws of the two countries should harmonize (in other words, that this case should be affirmed by this Honorable Court); but even if that cannot be, respondent desires that the law of the United States should be uniform for all its ports.

For the foregoing reasons, the respondent requests this Honorable Court to grant the writ of certiorari for which the libelant has petitioned, and prays this Court to hear the appeal and render a decision which shall settle the law throughout the United States.

Respectfully submitted,

J. M. Richardson Lyeth,
Proctor for Respondent.

New York City, October 22, 1928.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1921.

No. 306.

GULF REFINING COMPANY,
Petitioner
(Libelant-Appellee below),

against

ATLANTIC MUTUAL INSURANCE COMPANY,
Respondent
(Respondent-Appellant below).

BRIEF IN BEHALF OF RESPONDENT.

J. M. RICHARDSON LYETH,
Proctor for Respondent.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1928.

No. 506.

GULF REFINING COMPANY,
Petitioner,
(Libelant-Appellee below),

AGAINST

ATLANTIC MUTUAL INSURANCE COMPANY,
Respondent,
(Respondent-Appellant below).

BRIEF ON BEHALF OF RESPONDENT.

Statement.

This case comes up on writ of certiorari to review the decree of the Circuit Court of Appeals for the Second Circuit which reversed the final decree of the United States District Court, Southern District of New York, in favor of the libelant in this suit.

The opinion of the Commissioner appointed by the District Court to hear and report on all issues is reported only in 1927 Am. Mar. Cas. 1669 (R. 160-179).

The District Court confirmed the Commissioner's report without opinion (R. 181).

The opinion of the Circuit Court of Appeals, reversing the District Court and the Commissioner, is reported in 27 Fed. (2d) 678 and in 1928 Am. Mar. Cas. 1371.

The parties will be described as they were in the District Court.

The Facts.

The libelant seeks recovery against the respondent under a policy of war risk insurance on cargo by reason of general average contribution assessed against said cargo.

The facts relative to the voyage, disaster, general average expenses, sacrifices and contributory values were admitted by stipulation, and the general average statement itself was not questioned (R. 152-160). The insured cargo almost doubled in value during the course of the voyage, and consequently the insured value was approximately one-half the value used in the general average statement, customarily called the contributory value.

The insured cargo of gasoline was shipped on the S. S. *Gulflight* at Port Arthur, Texas, in April, 1915, to be transported to Rouen, France. During the voyage, the steamer was torpedoed by a German submarine. The crew abandoned the vessel, but she was subsequently towed into St. Mary's Harbor in the Scilly Islands. To lighten the vessel and enable her to proceed to destination, part of the cargo was discharged and sold at great sacrifice, and, after temporary repairs had been effected, the *Gulflight* resumed the voyage with convoy and assistance, arriving at Rouen on June 13th.

The general average statement is not part of the record, but the figures material to this litigation are set forth in a stipulation (R. 152-4). The following is a summary of the general average statement:

Total general average charges			$129,225.43
Contributing values:			
Vessel	$590,000.00		
Add amount made good	569.45	$590,569.00	
Freight at risk	68,741.33		
Less wages & port charges	2,102.96		
Add amount made good	23,845.41	90,484.00	
Cargo	312,866.02		
Add amount made good	104,312.62	417,178.00	
Total contributory values			$1,098,231.00

The proportion of general average was, therefore, 129,225.43/1,098,231 or 11.76669%.

The general average contribution found due from the cargo was 11.76669% of $417,178 or $49,088.04. This general average contribution was paid by the libelant as of February 24, 1916, and the said amount made good to cargo of $104,312.62 was received by libelant as of February 24, 1916. In other words, the libelant was entitled to a net credit in general average of the difference between $104,312.62, the value of the cargo sacrificed, computed at the market value at Rouen, and $49,088.04, the contribution from the whole cargo, computed at the same market value at Rouen, viz., $55,224.58. The insured value of the cargo was $212,000, as compared with the contributory value of $417,178. The respondent insured $27,690 valued at said $212,000.

The Question.

The libelant claims that the underwriters collectively insuring its cargo at a value of $212,000 are liable for the whole of the general average contribution.

The respondent claims that the underwriters collectively are liable only for that proportion of the general average contribution which the insured value bears to the contributory value. The result of that proportion should again be

multipled by $27,960/$212,000 to obtain the sum for which the libelant claims it was liable under its policy. The arithmetic is slightly complicated, but the claims of the respective parties may be reduced to the following figures:

The respondent admits and has paid $49,088.04/$417,178 × $27,690 or $3,258.25. The libelant claims that respondent is liable to pay $27,690/$212,000 × $49,088.04 or $6,411.54. The amount, therefore, in dispute is $3,153.29.

The mathematical complications arising from the fact that there were several underwriters on the cargo may be disregarded and the case may be considered as though there were only one underwriter insuring the entire cargo. The sole question of law, therefore, is whether an underwriter on cargo under a marine insurance policy is liable only for that proportion of a general average contribution which the insured value bears to the contributory value or whether he is liable for the whole general average contribution (assuming it does not exceed the amount insured) even though the contributory value is greatly in excess of the insured value.

The policy of insurance is printed at length on pages 155-160 of the record. It is the usual form of marine insurance policy but is restricted by endorsement of a rubber stamp in the margin so as to cover war risk only (fols. 478-9). It is admitted by both sides, however, that, in so far as the question involved in this suit is concerned, there is no difference between the law applicable to war and marine insurance and that consequently cases involving marine insurance are in point. Since the policy contains no express provision dealing with the question in this suit, it must be decided by reference to general principles of law.

The policy in question in this suit contains no express promise by the underwriter to pay general average and, indeed, policies of marine insurance rarely, if ever, contain any such express promise. If an assessment in general average is made against goods by reason of the operation of a peril insured against, the liability of the owner of the goods to pay

general average is viewed as the proximate result of the peril and the underwriter is consequently liable.

The object of this litigation is to have the law of the United States settled. The decision below is in direct conflict with a decision by the Circuit Court of Appeals for the Ninth Circuit in November, 1910 (*British & Foreign Marine Insurance Company* v. *Maldonado*, 182 Fed. 744, herein referred to as the *Maldonado* case). The decision below of the Circuit Court of Appeals for the Second Circuit conforms to the English law and to the law and practice prevailing in the other principal maritime nations of the world, and also conforms to the law of the state courts in Massachusetts.

Definitions.

Particular average, in the language of marine insurance, is a term designating any partial loss which is not the result of an intentional sacrifice for the safety of the common adventure.

General average is a loss which is a result of an intentional sacrifice for the safety of all the interests at risk in the common adventure of the voyage.

General average statement is the computation of the payments, usually referred to as contributions and credits in general average, which are to be paid and received in order to distribute the general average losses pro-rata among all interests saved by the general average sacrifice.

Contributory value is the value upon the basis of which the general average contributions to be paid and received are computed; in the case of cargo this value is the market value of the goods at destination plus the amount, if any, to be made good in general average.

Libelant's rule: As a matter of convenience in referring in this brief to the rule of law contended for by the libelant,

to the effect that marine underwriters should be liable to pay the entire amount of general average contribution assessed against the cargo insured, regardless of whether the actual market value exceeds the agreed value stated in the policy, this rule will be referred to as "libelant's rule." This is the rule which the libelant has referred to in its brief as the "rule of full indemnity."

Respondent's rule: Likewise, as a matter of convenience in referring in this brief to the rule of law contended for by the respondent, to the effect that marine underwriters should be liable to pay only such proportion of the general average contribution assessed against the cargo insured as the agreed value stated in the policy bears to the actual market value of the goods, this rule will be referred to as "respondent's rule." This is the rule which the libelant has referred to in its brief as the "rule of co-insurance."

Digest of Laws and Decisions.

The laws of the leading maritime nations of the world, viz., England, France, Germany, Holland and Japan, are in accord with respondent's rule (R. 152-4).

English Decisions.

The English law is settled in accord with respondent's rule with respect to both hull and cargo insurance.

Steamship Balmoral Co. v. *Martin*, 1902 Appeal Cases, 511.

Arnould Marine Insurance, Section 1005 (11th Ed., p. 1307).

Marine Insurance Act, 1906, Section 73.

With respect to particular average, the English law seems to have different rules for hull and cargo. The rule as to

cargo follows the universal practice and is in accord with respondent's rule. *Lewis* v. *Rucker*, 3 Bur. 1167.

In the case of particular average loss on hull the rule in England is that the underwriter shall pay the cost of repairs irrespective of any difference between the insured value and the actual value of the vessel. *Marine Insurance Company, Ltd.* v. *China Trans-Pacific S. S. Co., Ltd.*, 11 Appeal Cases 573; *Lohre* v. *Aitchison*, 4 Appeal Cases 755; but see *Pitman* v. *Universal Marine Insurance Company*, 9 Q. B. D. 192.

Massachusetts Decisions.

In Massachusetts, with respect to hulls, the law as to general average follows the English rule as enunciated in the *Balmoral* case and is in accord with respondent's rule. *Clark* v. *United Fire and Marine Insurance Company*, 7 Mass 364, 375. We have been able to find no Massachusetts case dealing with particular average on hulls.

With respect to cargo the Massachusetts rule as to general average contributions is in accord with respondent's rule. *Clark* v. *United Fire and Marine Insurance Company (supra)*. With respect to particular average on cargo the rule is also in accord with respondent's rule. *Forbes* v. *Manufacturer's Insurance Company*, 1 Gray 371 (374).

New York Decisions.

In New York the rule with respect to *hull* insurance is contrary to respondent's rule both with respect to particular average and general average.

PARTICULAR AVERAGE:

International Nav. Co. v. *Atlantic Mutual*, 100 Fed. 304 (referred to as the *St. Paul* case).

The St. Johns, 101 Fed. 469.

Columbia Trust Co. v. *Norske Lloyd Insurance Co.*, 100 N. Y. Misc. 550—aff'd 229 N. Y. 556.

GENERAL AVERAGE:

Providence S. S. Co. v. *Phoenix Insurance Co.*, 89 N. Y. 359.

International Nav. Co. v. *Atlantic Mutual Insurance Co.*, 100 Fed. 304.

International Nav. Co. v. *Sea Insurance Co. Ltd.*, 129 Fed. 13 (C. C. A., Second Circuit).

With respect to *cargo*, the New York rule as to particular average is in accord with the respondent's rule. *International Nav. Co.* v. *Atlantic Mutual Insurance Co.* (*St. Paul* case), *supra*; *Lawrence* v. *New York Insurance Co.*, 3 Johnson's Cas. 216.

The New York rule as to general average on cargo is the question in this case.

We have appended a diagram showing the laws of England, Massachusetts and New York, divided vertically between hull and cargo, and in each case divided horizontally between particular average and general average.

Maldonado Decision.

British and Foreign Marine Insurance Company v. *Maldonado Company*, 182 Fed. 744 (C. C. A., Ninth Circuit, November 1, 1910). In that case the libelant procured from the respondent insurance commpany insurance on a cargo of kapok against perils of the sea, including general average contributions payable by the goods insured. Fire broke out on the voyage and the vessel was stranded and water pumped into the holds. After necessary repairs she proceeded to San Francisco.

The insured value of the cargo was approximately $48,000 and the contributory or arrived market value was approximately $66,000. The share due from the cargo was $22,000 but the underwriter contended that it was liable only for

that proportion of $22,000 which the insured value bore to the contributory value. The Circuit Court of Appeals held that the underwriter was liable for the whole of the general average contribution. The opinion contains a full discussion of the decisions and of the conflicting rules in the various jurisdictions. It purports to determine what is the New York rule with respect to cargo insurance and then determines that the law of the Port of San Fancisco should follow the New York rule. Three reasons appear to govern the decision: (1) The insurance value in the policy constitutes an estoppel against the underwriter and prevents him from ever asserting that the subject insured has a different value; (2) That the underwriter's contention operates only for the benefit of the underwriter and never for the benefit of the assured; (3) The language of the policy should be strictly construed against the underwriter and since no express stipulation covering the question is contained in the policy it should be resolved against the underwriter.

Opinions Below in the Present Case.

The Commissioner's report, which the District Court affirmed without opinion, followed in general the reasoning of the opinion of the Circuit Court of Appeals for the Ninth Circuit in the *Maldonado* case (*supra*).

Judge Learned Hand, in writing the opinion for the Circuit Court of Appeals for the Second Circuit in the present case, held that the liability of an underwriter to reimburse an insured for a general average assessment was similar, in legal nature, to the liability of the underwriter for a particular average loss, and that the same considerations of fairness which imposed proportionate liability for a particular average loss operated equally to impose a similar liability for general average. Such considerations of fairness were based

principally upon the rule that the extent of the underwriter's liability in the case of a partial loss should be proportioned to the agreed value stated in the policy and that, therefore, in a case where the market value exceeded the agreed value, the owner was in effect, to the extent of such excess, a co-insurer.

POINT I.

In the case of a particular average loss under a valued policy of insurance on cargo, the owner is co-insurer with the underwriter as to the excess value existing in fact over and above the insured value.

In marine policies on cargo which do not contain an agreed value, the underwriter is liable in case of a particular average loss only for such proportion of the loss as the prime cost bears to the sound value.

Usher v. *Noble*, 12 East 639;
Clark v. *United etc. Company*, 7 Mass. 365.

The practice of inserting in policies an agreed value arose in order to avoid the trouble incident to proof of prime cost, i. e., the value at time of shipment. The prime cost was, therefore, agreed upon in advance and was inserted in the policy in the form of an agreed value. *Lewis* v. *Rucker*, 3 Burr 1167.

The same general procedure is followed in computing the liability of an underwriter for a particular average loss to cargo under a valued policy as under an unvalued or "open" policy; in each case the percentage of damage to the goods is computed by reference to the damaged and the sound value

of the goods and the underwriter is held liable to pay such percentage either of the prime cost or of the agreed value, as the case may be.

It is thus a fundamental rule in the law of marine insurance that the liability of an underwriter on a valued policy on cargo cannot be affected by fluctuation in the market value of the cargo. If the cargo is damaged to the extent of one-half its value, the underwriter is liable for one-half the insured value, no matter what the market value of the cargo at destination would have been. The universal rule as to the settlement of particular average losses on cargo carries out this fundamental idea in the most practical method possible. The damaged cargo is sold at destination. The sound value of the cargo in the same market is determined and thereby the proportion or percentage of loss is arrived at. The insured value is multiplied by this percentage and the result is the loss payable by the underwriter. This rule is universally applied in practically every maritime nation in the world. It apparently had its origin in England in *Lewis* v. *Rucker*, 3 Bur. 1167 (1761). See also *Johnson* v. *Sheddon*, 2 East 580 (1802). The following cases establish the rule in this country:

International Nav. Co. v. *Atlantic Mutual Insurance Co.*, 100 Fed. 305 at 317, 318, 324, S. D. N. Y. 1900.

London Assurance v. *Companhia de Moagens*, 167 U. S. 149 (1896).

Lawrence v. *New York Ins. Co.*, 3 Johns. Cases 216 (1802).

Forbes v. *Manufacturer's Ins. Co.*, 1 Gray 371 (1854).

38 Corpus Juris 1123:

"It is a general rule peculiar to contracts of marine insurance that where the value of insured's interest in the property insured exceeds the amount of the insur-

> ance, insured is deemed a co-insurer as to such uninsured part, and the underwriter is only liable for such proportion of the loss as the amount of the insurance bears to the value of insured's interest."

The purpose of this rule is to stabilize the liability of the underwriter upon the basis of the insured value. The underwriter is relieved from increased liability in the event of an increased market value, and the insured is protected against recovering less than the proper percentage of the insured value if the market value declines. Thus, if goods are insured at $100, and their market value at destination if saved would be $200, and a partial loss equal to 20% occurs, the owner has suffered a pecuniary loss of $40. On the other hand, the insurance premium was calculated upon the basis of a 20% loss making the underwriter liable only for $20, and it is unfair to hold the underwriter for more that that. In the converse case, if the market for the same goods had fallen to $50 instead of rising to $200, on principles of strict indemnity the owner should claim only $10 from the underwriter, since that was the extent of the owner's actual loss. The owner, however, had doubtless borrowed money or made other commitments on the basis of the insured value, and the underwriter had received his premium on the same basis. It is, therefore, fair that the underwriter should pay that proportion of the insured value which the amount of the loss bore to the sound value of the goods, *i. e.*, 20% or $20.

The marine underwriter insures against certain risks expressly enumerated in the policy, such as perils of the sea, or war risks, but does not and cannot insure against fluctuations in market value. The risk of changes in market value the owner of the goods must bear himself; the amount of the underwriter's liability under a valued policy should not in any event be changed by fluctuations in market value.

An underwriter can calculate upon the basis of averages the chance of a marine peril happening to a given shipment, but he cannot and does not compute the chance of a rise or fall in the market during the period that the shipment is at risk.

The purpose of an agreed valuation in a marine policy is to establish a definite value for the goods upon the basis of which all losses, either total or partial, are to be computed.

The libelant states in Point IV of its brief that "with valued policies true co-insurance arises only in cases where the assured has not taken out enough insurance to cover the whole agreed value." Unless this statement is meant as merely a quibble upon the technical meaning of words, it is certainly not sound. In the case of a total loss of goods under a valued policy where the market value of the goods exceeds the agreed value, whether by reason of original undervaluation or of subsequent increase in value, the owner is, in substance, a co-insurer in that he bears the loss to the extent that the actual value exceeds the insured value. So also where a particular average loss occurs to goods whose market value exceeds the agreed value, the owner must himself bear a portion of such loss in the proportion that the actual value exceeds the insured value.

POINT II.

General average is a partial loss which is not distinguishable in legal nature, for the purpose of cargo insurance, from a particular average loss.

The respondent contends that the same general principles should be applied to the settlement of a general average contribution on cargo as are applied to the settlement of a particular average loss. In the latter case the goods insured suffer a physical damage; in the former case the interest of some other owner suffers loss through the operation of a peril insured against, and the goods insured are subjected to a liability to contribute to make good such loss. In either event the loss is the result of the operation of a peril insured against.

Parsons Marine Insurance, Vol. II, p. 208.
S. S. Balmoral Co. v. Marten (1901), 2 K. B. 896.

The origin of general average is traditionally referred to the ancient Rhodian law which is said to have recognized jettison as general average. *Lowndes, General Average*, 6th Ed., page 1. It is now established that any sacrifice made during the course of a voyage, which sacrifice is necessary in order to avert disaster to the whole venture, i. e., to hull, cargo and also to freight, if at risk, is a proper subject of general average. Thus, if during a storm it becomes necessary as a safety measure to lighten the ship by throwing overboard some cargo, it is not fair that the owner of the cargo thus jettisoned should bear the entire loss suffered when such loss benefited both hull and other cargo, nor should the Master be placed under any duty to select for jettison a pro-rata amount of goods from each shipment on board, since that would obviously be impracticable. The Master is left free to exercise his discretion solely with regard to the safety of the ship and all on board. The selection of any particular

article of cargo as against any other article of cargo for sacrifice, however, obviously depends upon the more or less accidental fact of where the article of cargo selected for sacrifice was stowed in the hold, etc. The general average contributions which are assessed against other cargo which is saved by the sacrifice are merely in substitution for the loss which should in fairness have been imposed pro-rata on such other cargo by the sacrifice of a proportionate part of each other shipment. General average is thus merely a device for spreading a partial loss of a certain nature over all the interests at risk on the voyage which were saved by the general average sacrifice.

The average adjuster in computing the amount of contribution payable by each interest, first ascertains the aggregate contributory value of all interests, and the aggregate amount to be made good in general average; the ratio between these two amounts gives the percentage, which is then applied to the contributory value of each interest to ascertain the amount of the contribution in dollars and cents which each interest is to make. As in the case of a particular average loss, so also in the case of a general average loss the loss is thus stated as a certain percentage of the value of the goods.

To illustrate the computation of a particular average loss, assume in the present case that the same amount of gasoline which was sacrificed had been lost through leakage or some other means constituting a particular average loss and assume for the sake of simplicity that one underwriter insured the whole cargo. Assume further the same corresponding valuations as follows:

Sound market value of damaged or lost cargo, there being no salvage (This corresponds to amount made good in general average)	$104,312.62
Sound market value at destination of total cargo	417,178.00
Insured value	212,000.00

Under the universal rule the underwriter's liability would be $104,312.62 ($417,178 × $212,000, equals $53,000 (approximately). The merchant would, therefore, have sustained a loss of profits by reason of being underinsured by the difference between

Market value of lost cargo	$104,312.62
Amount receivable from underwriter	53,000.00
Insured's loss of profits	$51,312.62

In the present case, where the loss is general average, if respondent's rule is adopted by the Court, the insured's share of the general average contribution will be ($212,000 / $417,178 × $49,088.04 equals $24,544.02. This figure represents what the insured is out of pocket by reason of his under insurance and compares with the figure of $51,312.62, loss of profits in the assumed case of a particular average loss.

If the libelant's rule is adopted by the Court, the insured would bear no part of the contribution payable by his cargo.

It is submitted that there is no reason, legal, equitable or moral, why the assured should escape entirely the burden of his under insurance simply because the loss happened to occur through a general average sacrifice rather than in some other way which would give rise to a particular average loss. The benefit from the fact it was a general average sacrifice is reflected in the reduction of the burden by more than 50%, yet the effect of the libelant's rule is that the assured should benefit further by the fact that the loss occurred through a general average sacrifice and be relieved entirely of the burden resulting from under insurance. This is contrary to the fundamental purpose of general average which is to distribute the loss evenly over all interests and to remove inequalities arising from the sacrifice of one man's goods rather than another's. As a matter of fact, if any dis-

tinction is to be made between the underwriter's liability on a particular average loss and a general average sacrifice there would seem to be more equity in treating the merchant as a co-insurer in the case of a general average sacrifice because as a result of the general average statement the merchant is receiving credits on the basis of the destination value and he cannot in equity deny to the underwriter that the contribution is based on the same valuation. Yet, in fact, that is exactly what the libelant is trying to do in this case: he is trying to have his cake and eat it. For the sake of convenience in argument, let us assume in the case at bar that destination or contributory value of the cargo is exactly double the insured value. As a matter of fact the fraction $212,000/$417,178 is 50.08%. Approximately one-quarter of the cargo was lost by the general average sacrifice. The libelant has received $104,000 from general average, substantially twice the insured value of the portion lost, yet he maintains that the underwriter must bear the whole of the general average contribution which is based on a valuation double the value stated in the insurance policy and upon which the underwriter received his premium.

The injustice and inequity of the libelant's position is even more apparent if we should consider the net credit in general average. It is conceivable that the underwriter might take the position that, one-quarter of the cargo having been lost, he is liable for one-quarter of the insured value, viz., $53,000. By payment of that loss he would become subrogated to the rights of the assured in general average. The net credit in general average was $55,224.58. Therefore, the underwriter owes nothing under his policy. This is by no means a fanciful argument because one of the principal points decided by Judge Brown in the *St. Paul* case (*International Nav. Co.* v. *Atlantic Mutual Insurance Company*, 100 Fed. 304) was that an assured may sue the underwriter for the loss sustained by general average sacrifice without waiting for the general average statement.

It is respectfully submitted that this argument whereby no liability upon the underwriter results, is just as fair and equitable as the position of the libelant in this case. In the one case the underwriter would take all the benefit of the increase in value of the cargo, and the libelant, in maintaining his contention in the present case, is trying to take all the benefit of the increase in value without assuming any of the burden. Neither of these extreme positions is fair or equitable. The merchant is entitled to the benefit of the increase in market value but he must also share the burden of that increase with the underwriter because, in point of fact, he is a co-insurer with the underwriter to the extent of the difference between the destination or contributory value and the insured value. The underwriter on the other hand is not entitled to the benefit of the rise of market because he did not assume the risk of market fluctuation and, therefore, he cannot fairly be penalized by the rise in market. He should only be made to respond to the loss sustained by a peril insured against, based on the insured value upon which his premium was computed.

The libelant argues on pages 28 and 29 of its brief that the general average statement should be re-cast if the respondent's rule were to be adopted so as to reduce the contributory value of the cargo to its insured value, and then to recompute the general average distributions payable between the various interests; the underwriter then to pay the entire amount assessed against the cargo under such revised computation. This is obviously fallacious, however, for the various interests contribute to general average as among themselves upon the basis of actual market value. There is neither occasion nor justification for changing this. But in the present case this cargo was in fact underinsured, *i. e.*, insured for only a portion of its market value; it is fair, therefore, that the underwriter should reimburse the owner only for the amount of general average contribution assessed

against that portion of the value of the goods which the underwriter had insured, and that the owner should bear the loss as to the uninsured value in the same manner that the owner would have borne the loss had the loss been particular average instead of general average.

POINT III.

The law of New York was not in accord with the libelant's rule, and the practice in New York prior to the Maldonado Decision applied the respondent's rule.

The libelant, in Point Two of its brief, cites the case of *Strong* v. *New York Firemen Insurance Company*, 11 Johns. 323 (1814), as establishing the libelant's rule as the law of New York as to cargo policies.

That case has always been cited for the proposition that a general average adjustment made in a foreign port in accordance with the law of such foreign port, would bind the underwriters of the home port, although the law of the home port differed radically from the law of the foreign port. The question involved in the present case was not discussed in the opinion of the Court. The mere fact that Counsel for the underwriters in that case may have presented arguments similar to the arguments we are urging in the present case, and that the underwriters were defeated, is no basis for urging that the *Strong* case is an authority establishing the law of New York or in any way controlling upon the Circuit Court of Appeals for the Second Circuit. The Circuit Court of Appeals, below, did not regard the *Strong* case as a decision on the question involved here, as appears from the following quotation (R. 192, 193):

> "In general, therefore, it appears to us that since co-insurance is right in principle, and is admittedly the law as to partial losses, it should apply to general average contributions. We can find nothing to the contrary in

the books except *British etc. Co.* v. *Maldonado & Co.*, 182 Fed. Rep. 774 (C. C. A. 2), and an early New York case, *Strong* v. *Firemen Ins. Co.*, 11 Johns. 323, in which the chief point discussed was as to the proper place at which the adjustment should be computed. The question of whether when the amount was reached, the underwriter was liable in toto was assumed."

All of the other New York cases cited in Point Two of libelant's brief deal with hull policies.

We respectfully submit that there is no case in the State or Federal Courts of New York decisive on the question here involved.

We respectfully submit that the testimony shows conclusively that, at least up to the time of the *Maldonado* decision in 1910, the practice among underwriters in New York was to apply the respondent's rule to the settlement of general average contributions under cargo policies where the contributory value was higher than the insured value. The Commissioner found that there was no custom in New York in 1915 and 1916 respecting the settlement of general average contributions under cargo policies. He said:

"No such custom or usage was proved. It appeared that adjusters commonly based general average contributions upon contributory values without regard to policy values. But underwriters do not always pay contributions thus ascertained; if they did they collected from their assured the difference between the contributory and policy values. After the decision of the *Maldonado* case in 1910, refusals on the part of underwriters to pay on the basis of the full contributory value were less frequent" (R. 168).

The only reference in the opinion of the Circuit Court of Appeals is contained in the following clause occurring at the end of a long sentence (R. 190):

"• • • there being no authority controlling upon us, and the practice of the underwriters being largely in

dispute, at least since the decision of the Ninth Circuit in *British etc. Co.* v. *Maldonado & Co.*, 182 Fed. Rep. 744."

Although the Commissioner's report, affirmed without opinion by the District Court, and the decree entered thereon, were reversed by the Circuit Court of Appeals, we do not feel that we can properly ask this Honorable Court to review the finding that there was no such custom or usage in 1915 and 1916. However, we do claim that the testimony and the findings themselves of both the Courts below conclusively establish that there was no practice in New York recognizing the libelant's rule as set forth in the quotations from certain text writers in Point Three of libelant's brief.

On the contrary, the testimony shows conclusively that prior to the *Maldonado* decision in 1910, the practice among underwriters in New York was to apply the respondent's rule to settlements of general average contributions under cargo policies. Mr. Cornelius Eldert, President of the respondent company, who has been in the marine insurance business since 1865, testified that such a custom had existed among underwriters for fifty years (R. 18, 19). He said that it had been in practice up to the date of the decision in the *Maldonado* case, but that after that date that decision had caused some underwriters to follow its rule rather than the former custom or practice (R. 27, 28). Mr. Albert Ullman testified that he was a marine underwriter acting as agent for six companies, and that he had formerly acted for eight other companies. His experience for 35 years was that the custom and practice of applying the doctrine of co-insurance to the settlement of general average contributions under cargo policies was uniform and universal (R. 30, 31). He further testified that it was unchanged after the *Maldonado* case (R. 31, 33). Mr. John A. Jeremiah, who was in the marine insurance business from 1875 until he retired in 1910, testified that from his experience he had found the custom to be universal, and that "there was nothing else done" (R.

34-36). The testimony of Mr. Galloway C. Morris and of Mr. Andrew G. Lange (comparatively younger men) was to the same effect except that their actual knowledge and experience did not go as far back as that of the previous three witnesses.

To refute this evidence of custom established by these five witnesses, the libelant offered the evidence of two witnesses whose testimony was chiefly directed to the fact that whatever custom there may have been was largely broken up after the *Maldonado* decision in 1910.

The statements of the text writers quoted in Point Three of libelant's brief are, therefore, clearly erroneous. That the practice in New York up to 1910 was in accord with respondent's rule, is clearly established by the testimony. The finding of the Courts below merely negatives the fact that such practice and custom continued unbroken after 1910.

POINT IV.

The distinction made by the Circuit Court of Appeals between cargo and hull policies is sound, both on practical considerations and on the authorities.

The Circuit Court of Appeals, in the last paragraph of its opinion, considered the classification of the rules governing the settlement of particular average losses and general average losses to cargo and hull policies in a most logical and well-considered manner. The application of the doctrine of co-insurance to settlements of particular average losses on cargo is universal. The reason for not applying it to settlements of particular average losses on hulls is set forth in the opinion of Lush, *J.*, in the English case of *Lohre* v. *Aitchison*, 2 Q. B. D. 507, 509:

> "If ships were kept merely for sale, it might reasonably be contended that the same principle should be

applied which is applied to damaged goods. But a ship is intended to be used for profit. The owner is in many contingencies bound to repair. He has always the right to repair, and it is in the contemplation of both parties that if damage happens the ship will be repaired if it is worth the cost. If, instead of repairing, the owner chooses to sell the ship in her damaged condition, he fixes his loss at the difference between what she was worth at the commencement of the risk and what she sold for. But if he elects to repair, the loss is ascertained by the cost of the repairs, less a proper deduction on account of having new timber for old."

This language was quoted by Judge Addison Brown in the *St. Paul* case.

Thus both in England and New York in the settlement of particular average losses one rule is applied to cargo policies and the other to hull policies. We have found no cases involving particular average on hulls in Massachusetts.

In England, respondent's rule is applied to general average contributions under hull policies (*S. S. Balmoral* v. *Martin*, 1902, Appeal Cases 511), and also under cargo policies. (Marine Insurance Act 1906—Sec. 73.) The *St. Paul* case apparently fixed the rule in New York contrary to that of England with respect to the settlement of general average losses under hull policies. This Court did not pass upon the *St. Paul* case (except to deny certiorari) and that decision on this point is not necessarily sacred or inviolate. It conflicts with the rule, not only in England, but in Massachusetts. *Clark* v. *United Fire & Marine Insurance Company*, 7 Mass. 364, 375. The reason for differing rules between hull and cargo policies is not so cogent when applied to settlements of general average contributions as it is when applied to particular average losses. In a particular average loss on hull, there is no necessity for ascertaining the ship's value; repairs are simply effected and the cost is charged against the underwriter. But in the ascertainment of a general average contribution, the value of the vessel

must of necessity be ascertained and a difference in valuation of the vessel is directly reflected in the amount of the general average contribution.

However, the question as applied to settlements under hull policies is not involved in this case. The Circuit Court of Appeals properly considered that the New York law was settled that libelants' rule should be applicable to hull policies with respect both to particular average and general average. The respondent's rule being universally applied to settlements of particular average under cargo policies, the question of classification for the Circuit Court of Appeals was whether the same rule should be applicable to general average contributions under cargo policies or whether libelant's rule, applied to general average on hulls only in the *St. Paul* decision, should be dragged over into cargo policies.

The decision below obviously has the advantage of simplicity in application,—one rule applied to hull policies and the other rule applied to cargo policies. Furthermore, we believe that the settlement of particular average losses under hull policies is the one anomalous case to which the libelant's rule should be applied, on the ground that in such cases only does the value of the vessel have no bearing whatever on the amount chargeable to the underwriter. Therefore the libelant's rule should not be extended to cargo policies at all; it really should not apply to general average under hull policies.

The libelant argues that general average contributions under cargo policies are in their nature exactly similar to particular average losses under hull policies; in each case the assured is obliged to pay a sum of money, in the one case to get his ship repaired and in the other, to get his cargo released from the lien of general average.

In the first place, this argument is not applicable to the facts of the present case. Here, approximately one-fourth of the libelant's cargo was sacrificed, and he actually received

from general average a great deal more than the amount of the contribution due from his cargo. Here, instead of having to pay money to release the cargo from the lien of general average, his very considerable profits on the transaction were somewhat lessened by the general average contribution.

Libelant's argument could only be applicable to a case where the cargo was entirely undamaged by any general average sacrifice and was assessed general average contributions without receiving any credits. Even in such a case, the distinction from particular average settlement under a hull policy is obvious. The value of the cargo is an important factor in determining the amount of the general average contribution, whereas the value of a vessel has no bearing on the cost of the repairs of a particular average loss.

POINT V.

The libelant's rule is not sound and should not be adopted by this court.

A. The presence of an agreed value in the insurance policy is not an estoppel.

One of the chief grounds of the decisions in the *Maldonado* case (*supra*), the only decision in the United States squarely in favor of the libelant, is that the underwriter is estopped to claim that the cargo has any other value than the insured value. It is respectfully submitted that this argument is fallacious.

The fact is that the agreed valuation in a cargo policy is not an estoppel of any kind. It is simply an agreement between the parties that for the purpose of computing a loss under the policy the cargo shall be valued at the figure stated in the policy. If, in fact, the value is greater, either party is at liberty to show that fact, but in computing the loss, it must be related back to the insured value. In a particular

average loss on cargo the underwriter is clearly not estopped to show the actual value. The percentage of loss is arrived at by determining the sound and damaged values in the market at destination and applying that percentage to the insured value (Point I, *supra*). The mere fact that the damage to the insured cargo happens to be recoverable in general average cannot impose an estoppel upon the underwriter. And even when the insured cargo is undamaged but is compelled to contribute, there is no reason for imposing an estoppel.

In fact, if there were any estoppel, it ought to operate against the assured, for he is the one who makes the representation as to value, and the underwriter acts on that representation in fixing the premium.

The effect of agreed value has come up for consideration also in determining whether an assured may abandon as for a constructive total loss. If a vessel be damaged so that the cost of repairs will exceed 50% of her value, the owner may abandon as for a constructive total loss. If the policy contains an agreed value the question arises whether the cost of repairs must be judged with reference to such agreed value or with reference to the ship's actual value. The Supreme Court of the United States has adopted the latter rule. *Patapsco Insurance Company* v. *Southgate*, 5 Pet. 604. In *Bradlie* v. *Maryland Insurance Company*, 12 Pet. 378, Judge Story, in approving of the rule laid down in *Patapsco Insurance Co.* v. *Southgate*, that the actual value of the ship at the time and place where the injury occurred was the proper test, said:

> "It follows from this doctrine that the valuation of the vessel in the policy, or the value at the home port or in the general market of other ports consitutes no ingredient in ascertaining whether the injury by the disaster is more than one-half the value of the vessel or not."

In *Peele* v. *Merchants Insurance Company*, 19 Fed. Cas. No. 10905, Judge Story also said:

> "Upon the first point it is contended by the defendant's counsel that the valuation in the policy is conclusive and affords the only just means of ascertaining the value, it being, as between the parties, the agreed value of the ship. The plaintiffs deny this doctrine and insist upon the actual value at the time of the loss as the true value. Nothing is more familiar or more clearly settled than the doctrine that the valuation in the policy is conclusive in case of a total loss; but it is inapplicable for the purpose of ascertaining the quantum of injury (for it is quite another question as to the quantum of payment to be made by the underwriters) in case of a partial loss of goods."

English Marine Insurance Act, 1906, Section 27, paragraph 4, provides:

> "Unless the policy otherwise provides, the value fixed by the policy is not conclusive for the purpose of determining whether there has been a constructive total loss."

The above cases, therefore, show that an agreed value in a policy is in no sense an estoppel but merely a basis to which losses must be referred. If there is an actual total loss the agreed value is paid in full, but if there is not an actual total loss the percentage of the loss actually occurring is ascertained and applied to the agreed value. Any other method works unfairly either to the underwriter or to the assured in case the insured and the actual values do not coincide.

The argument that the respondent's contention operates only for the benefit of the underwriter and never for the benefit of the assured is likewise unsound. In a particular average loss, if the price of the goods has fallen during the voyage the assured benefits by the insured value. The percentage of loss, ascertained by comparing the damaged and sound destination values, is applied to the higher insured values. In the case at bar, if the gasoline had declined in value the assured could have claimed immediately against

the underwriter, as for a particular average loss, the value of the gasoline sacrificed at the insured value. The underwriter would have paid the general average contribution out of the credits received. Thus the assured would have benefited by the insured value in a declining market. Furthermore, Mr. Eldert testified that in cases where the respondent has paid for a general average sacrifice, and later has received general average credits based on a value higher than the insured value, the respondent has refunded to the assured the proportion due to the increased value although the recovery was much less than the loss paid (fol. 353).

The Maldonado decision also touched upon the argument that since no clause had been inserted in the policy expressly limiting the underwriter's liability, the general rule that language in an insurance policy should be construed against the respondent would come into operation. In the case at bar the policy contains nothing whatever in regard to the liability of the underwriter for general average contributions. Clearly, the general rule of construction cannot be invoked against the appellant in this case where its liability for general average contributions is not based on any express language but is implied by law.

If language be used that is ambiguous, the usual rule is to resolve the ambiguity against the underwriter, but, in a case where there is no provision whatever in the policy relating to the question, the intent of both parties is obviously to leave that entire matter to the law to determine the extent or existence of liability. 32 C. J. 1152. The question then becomes simply a matter of determining what the existing law provides.

The libelant's rule does violence both to justice and the equitable purposes upon which general average is based in requiring the underwriter to pay the whole general average charges where the underwriter had at stake only the insured value, which was much less than the market or contributory value. The cargo owner who actually had at risk the difference between the market or contributory value and

the insured value, under the libelant's rule, escapes entirely the equitable burden of his contribution in general average although he receives and retains all the benefits, including in some cases, notably the case at bar, actual general average payments or credits based upon the higher value of his cargo.

B. The Libelant's rule would result in anomalous situations.

One test of the soundness of a rule of law is whether it reaches sound results as applied to various related situations. This test as applied to the libelant's rule shows that it produces anomalous results, whereas the rule put forward by the respondent produces uniform and consistent results.

(1) It has already been shown above in Point I that it should make no difference whether the goods insured suffer particular average or general average loss; in either case the liability of the underwriter should be the same. Under the respondent's rule this result would be reached, but under the libelant's rule there would be a difference of 50% in the result as applied to the facts of this case.

(2) Suppose that the owner not only insures his goods for the full amount of the insured value, but also takes out profits insurance to cover the increase in market value between the time of shipment and time of arrival. In the event of a particular average loss to the goods, the profits underwriter pays a partial loss in proportion to the percentage of the damage or loss to the goods.

Loomis v. *Shaw*, 2 Johns. Cas. 36.

In the absence of an express clause in the policy to the contrary, a profits underwriter should contribute to a partial loss which is general average. But if that is so, then the payment of a portion of general average by the profits underwriter should cut down by that much the loss recoverable by

the assured from the original underwriter, for the owner obviously cannot recover his loss twice. On the other hand, the amount of the loss payable by the original underwriters should not vary according to the presence or absence of profits insurance; the profits underwriter should be in the same situation as the owner in this respect.

(3) A situation may very easily be assumed where the actual value of the goods exceeds the insured value, and the general average contribution is sufficiently large, computed as it is on the basis of the market value, that it would equal the amount of the insured value. Thus to take the figures of the present case: insured value of cargo $212,000; actual market value of cargo at destination, $417,178. A proportion of contribution in general average of approximately 51% would therefore have equalled the whole insured value. There is, therefore, presented the anomalous situation of a partial loss of approximately one-half the actual value of the goods imposing an obligation upon the underwriter to pay an amount equal to a total loss; and the amount of the loss payable by the underwriter would not be changed by any increase in the percentage of contribution from 51% to 100%. If the percentage of contribution rose to 60%, there would be a partial loss which the assured could not recover in full because it would have exceeded in amount a total loss!

Moreover, as pointed out above, had the particular goods insured been sacrificed instead of some other goods, there would have been as to these goods a particular average loss, and the insured could only have recovered that portion of the insured value which the percentage of physical loss or damage bore to the insured value. This is contrary to the fundamental purpose of general average which is to distribute the loss evenly over all interests and to remove irregularities due to one man's goods having been sacrified rather than another's.

C. The affirmance of the decision by the Circuit Court of Appeals in this case would not make the insurer's policy misleading to the assured.

The libelant contends in Point VI of its brief that the decision of the Circuit Court of Appeals makes a marine insurance policy misleading to an assured because he has no notice upon the face of the policy that he is not fully covered for all general average contributions in the event that the goods increase in value. Such a contention is, however, obviously unsound. It might equally well be urged that the present rule as to the manner of computing the liability of an underwriter for a particular average loss under a valued cargo policy should be changed because the policy does not on its face expressly call attention to such rule of law. But this argument of the libelant is also self-destructive; for there is no express promise by the underwriter to pay general average at all, and by a similar course of reasoning the assured should not therefore expect any reimbursement for general average losses! It is simply a situation where the assured or his assignee must know the law; there are many similar situations where the existence, or the extent, of the liability of a marine underwriter are not expressly stated in the policy.

In Point VII of libelant's brief it also urges that the decision of the Circuit Court of Appeals is wrong because the contract should be construed in the light of the decisions at the time of its execution. We have attempted to show, however, in the digest of decisions which precedes Point I of this brief, that there was no decision squarely in point which was controlling upon the court below. The Circuit Court of Appeals for the Second Circuit also took this view of the matter (R. 190).

POINT VI.

In questions of marine insurance where there is no binding adjudication, the English law should be followed in order that there may be a uniform rule.

Many of the troublesome questions which have arisen in marine insurance have been decided in England, and it is desirable to have the law in the United States in harmony with the English law. The English precedents on many questions have been established for years and are usually accepted as controlling in the absence of decisions in the United States. In order that the law construing insurance policies in the United States may be uniform with the English law, it is important, in making a decision which will become a binding precedent, not to depart from the settled law and practice of England and create a different law of our own. This is particularly so, where the correct legal principle is on the side of the English rule.

In the opinion in the *"Eliza Lines"*, 199 U. S. 119, at page 128, Judge Holmes said:

> "Of course it is desirable, if there is no injustice, that the maritime law of this country and of England should agree."

In the case of *Queen Ins. Company of America* v. *Globe & Rutgers Fire Ins. Co.* ("The Napoli"), 263 U. S. 487, a vessel proceeding in a convoy without lights collided with another vessel proceeding in another convoy in a similar manner in the Mediterranean Sea. The question was whether the loss was covered by the marine or by the war risk insurance policy. Justice Holmes said in his opinion, page 493:

> "There are special reasons for keeping in harmony with the marine insurance laws of England, the great

> field of this business, and as we could not reverse the decision below without overruling *Morgan* v. *United States*, we are of the opinion that the decree of the Circuit Court of Appeals must be confirmed."

The Court followed *Britain S. S. Company* v. *King*, 1921, 1 A. C. 99, holding that the loss was caused by a marine risk.

In the case of *Porter* v. *Bank Line, Ltd.*, 17 Fed. 2nd 513, libels were filed against the owners of the *Poleric* to recover over $3,000,000 damages to cargo. The Court said in its opinion:

> "The bills of lading were issued by a British ship in a British Colonial Port. For this reason and also because it is important that the decisions of American Courts in matters of commercial law should conform to the English decisions, in the absence of some rule of public policy which would forbid (*The Turret Crown*, 297 Fed. 766), it is proper to ascertain the interpretation of similar clauses by the English Courts."

The decision of the District Court was affirmed by the Circuit Court of Appeals for the Fourth Circuit, but without express reference to this point, 25 Fed. 2nd 843.

So also in the case of *Borland, as Receiver*, v. *Standard Marine Insurance Co., Ltd.* ("The Rensselaer"), 1925 Am. Mar. Cas. 116 (App. Term, N. Y. Sup. Ct., 1st Dept., May, 1925), the Court followed an English decision holding that a clause in a marine insurance policy insuring against "damage to machinery through a latent defect" did not cover the cost of replacing the defective part. The Court reached this decision, although there had been a decision to the contrary on the point in the United States District Court for the Southern District of New York.

American courts have been anxious to keep the American law in harmony with English law on mercantile and commercial subjects, such as marine insurance, not only because of the fact that our law was derived from the English common law, but also, and principally, because of the large

amount of trade and commerce passing between the two countries and the resulting inconvenience and loss to merchants and business men in cases where the rules of the two countries are different.

Virtually every sale of goods, which are transported by water, involves a transfer of marine insurance. This makes it important for the American courts to keep their decisions on such subjects uniform wherever possible with the decisions of other important commercial and maritime countries. Courts of admiralty particularly have always been very careful to examine and consider the rules of law of other maritime countries before rendering a decision in their own forum. In the situation now before the court the respondent's rule is uniformly established in all the more important maritime and commercial nations of the world, viz., England, France, Germany, Holland and Japan (R. 153).

POINT VII.

The decree of the Circuit Court of Appeals for the Second Circuit should be affirmed with costs.

Respectfully submitted,

J. M. Richardson Lyeth,
Proctor for Respondent.

	HULL	CARGO
England	*Particular Average:* *Lohre v. Aitchison*, 4 Appeal Cases 755. (House of Lords, 1879). *Marine Insurance Company, Ltd v China Transpacific S. S. Co., Ltd.*, 11 Appeal Cases 573. Contra respondent's contention. *General Average:* *Steamship "Balmoral" v. Martin*, 1902 Appeal Cases 511 (House of Lords). Supports respondent's rule.	*Particular Average:* *Lewis v. Rucker*, 3 Bur. 1167. Supports respondent's rule. *General Average:* Arnould—Marine Insurance, Sec. 1005 (11th Ed.), pages 1307, 1308. Marine Insurance Act (1906), Section 73. Supports respondent's rule.
Massachusetts	*Particular Average:* No cases found. *General Average:* *Clark v. United Fire and Marine Ins. Co.*, 7 Mass. 364, 375. Supports respondent's rule.	*Particular Average:* *Forbes v. Manufacturers' Insurance Co.*, 1 Gray 371, 374 (1854). Supports respondent's contention. *General Average:* *Clark v. United Fire and Marine Ins. Co.*, 7 Mass. 364, 375. Arnould Marine Insurance, Sec. 1006 (11th Ed.), page 1311 note. Supports respondent's rule.
New York	*Particular Average:* *International Nav. Co. v. Atlantic Mutual Ins. Co.*, 100 Fed. 304 (referred to as St. Paul case). *The St. Johns*, 101 Fed. 460. *Columbia Trust Co. v. Norske Lloyd Ins. Co.*, 100 N. Y. Misc. 550—aff'd 229 N. Y. 556. Contra respondent's rule. *General Average:* *Providence and Stonington S. S. Co. v. Phoenix Ins. Co.*, 89 N. Y. 559. *International Nav. Co. v. Atlantic Mutual Ins. Co.*, 100 Fed. 304. *International Nav. Co. v. Sea Ins. Co., Ltd.*, 129 Fed. 13 (C. C. A., Second Circuit). Contra respondent's rule.	*Particular Average:* *International Nav. Co. v. Atlantic Mutual Ins. Co.*, 100 Fed. 304, at 323-325 (dictum). *Lawrence v. New York Ins. Co.*, 3 Johns. Cases 216 (1802). Supports respondent's rule. *General Average:* The case at bar.

SUPREME COURT OF THE UNITED STATES.

No. 506.—October Term, 1928.

Gulf Refining Company, Petitioner, *vs.* Atlantic Mutual Insurance Company.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[May 27, 1929.]

Mr. Justice Stone delivered the opinion of the Court.

Respondent issued a war risk insurance policy for $27,690 upon a cargo of gasoline, owned by petitioner's predecessor in interest and valued in the policy at $212,000, on board the tanker "Gulflight", bound from Port Arthur, Texas, to Rouen. On the voyage the "Gulflight" was torpedoed and put into a port of refuge where, in consequence of the injury to the ship, damages and expenses of a general average nature were incurred. A general average contribution of $49,088.04, the correctness of which is not questioned, was assessed against the cargo on the basis of the actual value of the cargo at destination, which was taken to be $417,178. Petitioner made claim on the policy for indemnity of $6,411.54, the proportion of the general average contribution which the amount of the policy bore to the agreed policy value of the cargo. Respondent paid only $3,258.25, that portion of the indemnity claimed which the agreed policy value bore to sound value at the time of the contribution, or that portion of the general average contribution which the amount of insurance bore to sound value.

In a suit in admiralty in the District Court for Southern New York to recover the balance claimed, that court confirmed the report of its Commissioner, 1927 Am. Mar. Cas. 1669, and gave judgment for petitioner, which was reversed by the Court of Appeals for the Second Circuit. 27 F. [2d] 678. This Court granted certiorari November 26, 1928, — U. S. —, because of a conflict of opinion between that and the Court of Appeals for the Ninth Cir-

cuit. *British & Foreign Marine Insurance Co.* v. *Maldonado & Co.*, 182 Fed. 744, certiorari denied, 220 U. S. 622.

The sole question presented here is whether, in adjusting a general average loss upon cargo insurance under a valued policy, the insured is co-insurer to the extent that the sound value of the cargo at the time of contribution exceeds its agreed value or, stated in somewhat different form, whether the effect of a valued policy on cargo, in limiting the liability of the insurer, is the same in the case of a general average as of a particular average loss.

It has long been the accepted rule that in the case of a partial loss of cargo insured under a valued policy, with the valuation honestly made, the insured, in case of increase or decrease in its value, recovers that proportion of his loss which the agreed value, or so much of it as was assumed by the particular insurer, bears to the sound value. In case of an increase in value his recovery is thus limited as though he were a co-insurer. *Lewis* v. *Rucker*, 3 Burr. 1167; *Johnson* v. *Sheddon*, 2 East 581; see *Tunno* v. *Edwards*, 12 East. 488, *Lawrence* v. *New York Insurance Co.*, 3 Johns. Cas. (N. Y.) 217, 218; *Forbes* v. *Manufacturers' Ins. Co.*, 67 Mass. 371; *London Assurance* v. *Companhia de Moagens*, 167 U. S. 149, 171; *British & Foreign Ins. Co.* v. *Maldonado*, *supra*; *International Navigation Co.* v. *Atlantic Mutual Insurance Co.*, 100 Fed. 304, 317, 318, affirmed 108 Fed. 987, certiorari denied 181 U. S. 623. So applied the rule permits the adjustment of the premium to an assumed certain and unchanging value of the subject of the insurance and protects the underwriter against increases in liability because of increase in value of the cargo, as it protects the insured against diminution of his right to recover which might otherwise result from a decrease in value. It recognizes that the purpose of valuing the cargo is not to fix the maximum amount of recovery, which is accomplished by limiting the amount of the policy, but to eliminate from the risk which the insurer assumes so much of it as is consequent upon fluctuations of the market value of the cargo, whether the loss be total or partial. For under it the insurer's liability for the loss suffered can never be greater or less than if the actual value were the agreed value. Agreed value thus stands in the place of prime value under an open marine policy where the insured recovers such part of his loss as prime value bears to sound value. See *Lewis* v. *Rucker*, *supra*,

at p. 1171; *Usher* v. *Noble*, 12 East 639, 646; *Clark* v. *United M. & F. Insurance Co.*, 7 Mass. 365.

Petitioner does not question the soundness of the rule when applied to partial loss of cargo, but argues that it should not be applied to general average contributions. It is said that petitioner need not refer to sound value to compute its loss, which is already fixed by the general average adjustment, and the valuation clause estops the insurer from showing that the sound value of the cargo was greater than the agreed value and so reducing the amount of its indemnity; also that the rule to be applied to the present case should be the same as that applied to insurance on hulls, where the insured is allowed to recover in full for a partial loss up to the amount of the insurance. Finally, it is insisted that this clause of the policy should be construed as having been adopted by the parties in contemplation of the rule contended for as one established by the decisions in New York, where the policy was effected, and as settled in *British & Foreign Marine Insurance Co.* v. *Maldonado & Co.*, *supra*.

Liability for general average contributions is a risk insured against by the marine policy as is loss by particular average. Its amount, as is the case of a particular average loss, is dependent upon and varies with the sound value of the goods. There is nothing in the policy to suggest that the liability of the insurer is to be computed on a basis different in the one case from the other, and a clause whose general use and effect is to limit risk from fluctuation of value of the cargo insured is equally applicable in both classes of risks. Such a limitation is justified in both cases by the fact that the only assignable purpose of the agreed value is to substitute a definite for an uncertain prime value and to eliminate from the contract, in the interest of both the insured and the insurer, the fluctuation of liability which would otherwise result from a change in sound value. To allow petitioner to recover for the loss suffered in double the amount which concededly would have been its recovery had the same loss resulted from fire, jettison or other partial loss of cargo, would be an anomalous result for which petitioner offers no justification in reason or in generally established principles of marine insurance law. The co-insurance principle long and consistently applied in the case of particular average losses under both open and valued policies,

gives a reasonable and equitable effect to the stipulation fixing value, consonant with principles generally applicable to marine insurance. It may be applied to general average contributions with like effect and with added consistency and harmony in the law.

The application of the agreed value to the adjustment of the insurance loss does not depend on estoppel as was suggested in *British & Foreign Marine Insurance Co.* v. *Maldonado & Co.*, *supra*. The policy agreement valuing the cargo at a specified amount is not a representation, or so regarded. It is no more than a stipulation, in effect, that for purposes of computation of the insurance liability the cargo shall be taken at an agreed value. Within this limitation the policy is still a policy of indemnity and the insured must prove the sound value of the cargo in order to ascertain his actual loss, by deducting from it the amount of the proceeds of the damaged cargo. In every particular average adjustment the insurer may rely on the sound value of the cargo in order to establish the extent to which the insured is a co-insurer. It is true that a general average contribution is always determined and stated in terms of money and so the insured may establish his loss merely by proof of its amount, but his contribution is itself based upon sound value which entered into its computation, and its amount for all practical purposes, as in the case of particular average is increased in proportion to the excess of sound value over agreed value, see *S. S. "Balmoral" Company* v. *Marten*, [1902] App. Cas. 511, 514, 515. We perceive no reason why his recovery may not likewise be reduced accordingly.

The rule that the insured may recover in full for partial losses under hull insurance, *International Navigation Co.* v. *Atlantic Mutual Insurance Co.*, *supra*; *International Navigation Co.* v. *Sea Insurance Co.*, 129 Fed. 13; *Providence & S. S. S. Co.* v. *Phoenix Insurance Co.*, 89 N. Y. 559; contra *Clark* v. *United M. & F. Insurance Co.*, *supra*; cf. *Brewer* v. *American Ins. Co.*, 123 Mass. 78, does not, we think, militate against the co-insurance rule as applied to cargo insurance, or afford support for that for which petitioner contends. We need not determine whether the rule as to hull insurance may be regarded as that of this Court or of others, or pass upon its merits. The distinction between insurance on cargo and that on hulls is an old one and a different result in the case of the latter may for that reason be accepted without affect-

ing the rule as to the former. Where the distinction has been regarded as established, the departure from the rule applied in case of particular average losses of cargo has been justified on the ground that damage to a hull is not customarily ascertained by its sale, as is the case with cargo. The usual practice in cases of partial loss is for the insured to make repairs. His repair bill represents a sum of money which is the amount of his damage, ascertained without regard to the ship's value, and so the rule has been adopted as more convenient in practice than one requiring determination of the sound value of the ship. See *Lohre* v. *Aitchison,* L. R. 2 Q. B. D. 501, 507. Some point is given to this explanation by the ruling in *Pitman* v. *Universal Marine Insurance Co.,* L. R. 9 Q. B. D. 192, that the same rule should be applied as in particular average loss of cargoes, where the repairs were not in fact made and the loss was established by a sale of the ship. And in a case of general average contribution by the hull, the House of Lords, in *S. S. "Balmoral" Company* v. *Marten, supra,* held the insured to be a co-insurer, thus applying the rule accepted in the case of partial cargo losses, and implicitly supporting the co-insurance rule applied below to general average contribution by cargo.

It is said that this rule would result in a recovery by the insured of more than the amount of his contribution, in event of a decrease in the value of the cargo below the agreed value. The court below seems to have thought that this might be so. But no court has so held. The insured in the case of partial loss of cargo whose sound value is less than the agreed, may recover more than his actual loss, since in computing the indemnity the cargo must be taken at the agreed value. But where there is in fact no loss of the cargo, it is not entirely clear upon what theory the insured could increase his recovery beyond his contribution in general average by any recourse to the agreed value. Having the cargo intact, no matter what its value, it may well be that the insured must needs be content with the discharge of the general average lien upon it.

While an appellate court may hesitate to set aside a rule of commercial law long and generally accepted and applied, such is not the case with the suggestion that general average contributions must stand on a different footing from particular average losses under a valued policy on cargo. That has been thought to be the

effect of an early New York case, *Strong* v. *New York Firemen Insurance Co.*, 11 Johns. (N. Y.) 323, in which counsel for the insurer argued against any such distinction. But the court seems to have considered that the only question before it was whether a general average adjustment made in a foreign port was enforceable against the insurer even though made under rules different from those in force in the home port. Diligent efforts at the trial of the present case to prove a custom failed. The commissioner's finding that no settled custom or usage was proved is not challenged here. He found that underwriters, the *Strong* case notwithstanding, did not usually pay general average contributions in full when sound value exceeded agreed value; that after the decision in the *Maldonado* case, refusals to pay on the basis of full contribution were less frequent, but some underwriters, including respondent, continued to settle on that basis and the failure to bring the issue before a court for adjudication was due to the fact that the amounts involved were too small to justify litigation.

The Massachusetts courts have followed the rule applied below. *Clark* v. *Universal F. & M. Insurance Co.*, *supra*, cf *Brewer* v. *American Ins. Co.*, *supra*. The other American cases have dealt with insurance on hulls and so are not decisive. The fact that the co-insurance rule has been applied to general average contributions in England, both by judicial decision, see *S. S. "Balmoral" Company* v. *Marten*, *supra*, and by statute, Marine Insurance Act, 1906, § 73, and that such is conceded to be the rule by law or custom in France, Germany, Holland and Japan, is of weight in making a choice of two conflicting rules applicable to sea-borne commerce. We conclude that the rule applied below is the more consonant with principle and the more consistent with other accepted doctrines of marine insurance, and that the judgment below should accordingly be

Affirmed.